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Office of Fair Trading

OFFICE OF FAIR TRADING

Private Actions in Competition Law: a consultation on options for reform

The OFT's response to the Government's Consultation

July 2012

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OFT response to BIS consultation 'Private Actions in competition law: a consultation on options for reform'

1. Introduction and Executive Summary

1.1. As the UK's competition and consumer authority, the Office of Fair Trading (OFT) welcomes the Department for Business Innovation and Skills' (BIS) consultation document on private actions in competition law (the Consultation Document). The OFT's mission is to make markets work well for consumers and we play a leading role in ensuring that markets operate competitively. In this context, we have a keen interest in encouraging effective systems of redress, including judicial private actions, both because they complement strong public enforcement and because we consider it is important that those who suffer harm from breaches of domestic and EU competition and consumer law can obtain effective redress.

1.2. In this context, we have carried out a considerable amount of work in relation to private damages actions for breaches of both competition and consumer legislation. These include our 2007 discussion paper and recommendations to Government regarding private damages actions for breaches of competition law in the UK[1], responding to Government consultations on the Consumer Advocate[2] and civil sanctions for consumer enforcers[3] and to Law Commission work on private redress under the Consumer Protection from Unfair Trading Regulations 2008[4]. We have also responded to European Commission consultations on collective redress for breaches of consumer and competition law[5] and to the Green and White Papers on damages actions for breaches of the EU antitrust rules[6].

1.3. We strongly support the proposals in the Consultation Document to facilitate private damages actions. We note that a number of the proposals are in line with our 2007 recommendations to Government on steps which might be taken at the domestic level to improve the effectiveness of redress for those who

[1] See OFT 916 and 916resp, '*Private actions in competition law: effective redress for consumers and business',* Discussion Paper (April 2007) and Recommendations from the Office of Fair Trading (November 2007).
[2] See http://www.oft.gov.uk/shared_oft/reports/oft_response_to_consultations/oft1212resp.pdf.
[3] See http://www.oft.gov.uk/shared_oft/reports/oft_response_to_consultations/oft1229resp.pdf.
[4] See http://www.oft.gov.uk/shared_oft/reports/oft_response_to_consultations/oft1355.pdf.
[5] Key pieces of work include the following: OFT 983, '*OFT's response to the EU consultation on consumer collective redress benchmarks'* (March 2008); OFT 1063, '*OFT's response to the EU Green Paper on Consumer Collective Redress'* (March 2009); and OFT 1100, '*OFT response to the EU Discussion Paper on consumer collective redress'* (July 2009).
[6] OFT 844, '*Response to the European Commission's Green Paper, Damages actions for breaches of the antitrust rules'* (May 2006). OFT 1006, '*Response to the European Commission's White Paper, Damages actions for breach of EC antitrust rules'* (July 2008).

have been harmed by breaches of competition law. We also identify in this response a number of points that, in the OFT's view[7], will be important to consider if and when taking forward certain proposals and finalising their practical details to ensure their effective implementation.

Interaction between public enforcement and private actions

1.4. We consider that it is necessary to have effective routes for consumers and businesses adversely affected by breaches of competition law to obtain redress through private damages actions in order to complement public enforcement. This will optimise the effectiveness of the overall competition regime. In terms of the role of public enforcement, as well as being the key factor in deterring businesses from breaching competition law, active public enforcement helps to create the environment in which private actions can be brought. Public enforcement also helps to develop the principles and application of the law and to facilitate private actions, in particular where it creates the legal basis for follow-on actions. Indeed, in some cases, it may well be only through the detection of anti-competitive conduct by public authorities that its victims are even aware of their loss. Equally, an effective regime for private actions complements public enforcement by creating additional deterrence, fostering compliance and ensuring that those who have suffered loss can obtain redress. We also recognise that private actions can increase the number of competition infringements that are pursued overall since public competition authorities have limited resources and can only prioritise a finite number of cases.

1.5. It is also important to note that public enforcement and private damages actions primarily serve different purposes. Public enforcement is concerned primarily with detecting, examining and imposing sanctions for anti-competitive activity and deterring it in the future. In contrast, private actions are primarily about providing compensation since they provide redress through the courts for civil wrongs to those who have suffered loss.

1.6. Therefore, we strongly agree with the Consultation Document that it is vital strengthening private actions does not undermine the role played, or the tools used, by public competition authorities. The two aspects of the regime should reinforce rather than create hurdles for each other to ensure optimal effectiveness. For example (and as discussed in more detail in Chapter 5 below) we welcome the proposals in the Consultation Document to ensure that

[7] This response reflects the OFT's views. Any references to the Competition and Markets Authority (CMA) in this response simply reflect the transfer of roles that is expected to take place following the passing and implementation of legislation proposed in the Enterprise and Regulatory Reform Bill.

leniency applications are still encouraged in the context of the other Consultation Document proposals making it easier to bring private actions.

1.7. Equally in a self-assessment regime, it is essential that businesses are provided with clear guidance on what does and does not breach the law so that they can achieve compliance with competition law. Therefore we think it is important that the proposals ensure that possible discrepancies between guidance and decisions issued by the national competition authority and judgments of the courts are avoided. In this context we welcome the recognition in the Consultation Document that it is important for the OFT to have powers to intervene in private actions before the courts where appropriate.

1.8. Furthermore, we consider that strengthening the ability of those who suffer harm to bring private actions seeking redress should not necessarily have an effect on the competition authorities' approach to enforcement decisions or processes. For example, we consider that civil courts, who assess damages claims daily, are better placed than the OFT to carry out assessments of the quantum of harm caused by infringements. This would be more effective overall than the OFT being required to set out in its decisions all the evidence required to prove a civil claim. However, particular changes to an authority's enforcement approach that might assist claimants could be considered if such changes would not undermine the speed or effectiveness of enforcement.

1.9. We consider further the interaction between private actions and public enforcement in our responses to specific proposals below.

Establish the Competition Appeal Tribunal (CAT) as the principal venue for competition actions in the UK

1.10. The OFT supports the proposals to make it easier for businesses to challenge anti-competitive behaviour, including allowing the CAT to hear standalone as well as follow-on cases, to grant injunctions and to operate a fast-track procedure that will allow simpler cases to be dealt with more quickly and cheaply. We also suggest that BIS considers whether the fast-track should be reserved only for SMEs, or whether the scheme should be extended to consumers and consumer bodies, who may also benefit from being able to use such a procedure. To ensure the effectiveness of this proposal, we think it will be important that the practical details of the fast-track procedure are thought through fully in order to ensure that the system works in practice, has sufficient safeguards to provide protection from unmeritorious claims and that the CAT is provided with sufficient resources to administer the scheme.

1.11. We support the proposal to introduce a rebuttable presumption of a 20 per cent overcharge in cartel cases, as well as BIS' proposal not to address the passing on defence in legislation.

Introduce an opt-out collective actions regime for competition law

1.12. The OFT strongly supports the possibility of opt-out collective actions to enhance the ability of businesses and consumers to obtain redress in both follow-on and stand-alone cases, and agrees that it is important that there are appropriate safeguards to prevent abusive litigation. Key safeguards might include a permission stage in which the court must decide whether it is appropriate for a particular representative body to be allowed to bring a collective action (taking account of factors such as the need for the body to be one that acts impartially and with integrity and that pursues claims motivated by the interests and detriment suffered by the group of claimants they are representing and not, for example, by the wider interests of the organisation or a part of it[8]). Strong case management as the case proceeds may also be key. We query whether only the CAT should hear collective actions as the High Court may be equally well placed in some cases. Moreover, given the lack of clarity as to the likely increase in volume of competition cases, it is not clear whether the CAT would have sufficient resources to support this otherwise.

Promote Alternative Dispute Resolution (ADR)

1.13. The OFT supports potential new ways to encourage parties to consider the use of ADR on a voluntary rather than mandatory basis[9]. In other words, parties should be encouraged to pursue ADR but they should not be required to have attempted or undergone ADR before being permitted to proceed in the courts. Such a requirement could create additional delay and costs and make it more difficult for claimants to seek judicial redress in appropriate cases.

1.14. We also support the proposal in the Consultation Document for the OFT to play a limited role in facilitating redress for consumers. We agree with the Consultation Document that it is important this role does not take significant resources away from the OFT's core enforcement work. In this context, we think it is important that both the key principles of the proposals and the practical implementation of schemes are considered thoroughly. In particular, as regards the suggestion that OFT certifies or approves redress schemes, we envisage that the OFT could approve such a scheme on a relatively high-level

[8] See BIS' published guidance for prospective specified bodies under section 47B of the CA98 www.bis.gov.uk/files/file11957.pdf.

[9] Although we note that the 1999 Woolf reforms to civil litigation have already led to a position where parties are expected to consider ADR before commencing court proceedings, so it is not clear precisely what the new proposals will add.

basis rather than, for example, being required to carry out a detailed assessment of the adequacy of the nature and quantum of the damages proposed in a scheme or to monitor the practical operation of the scheme.

1.15. In order to minimise the resources required for the OFT to approve schemes, we consider that it may be beneficial to limit the proposals to redress schemes that are set up voluntarily by undertakings rather than giving the OFT a power to require (potentially unwilling) undertakings to implement redress schemes. If BIS were to maintain the proposal for the OFT to require undertakings to set up redress schemes, the OFT would require substantial additional resources to perform this role.

Ensure private actions complement the public enforcement regime

1.16. Given the critical importance of the leniency regime in cartel detection and enforcement, the OFT very much welcomes the recognition that it is important to safeguard leniency incentives. In this context, we believe strongly that certain leniency documents must be protected from disclosure in court actions and that joint and several liability should be removed from, at the very least, undertakings that are granted Type A immunity. We think that these proposals are more important than ever given the recent judgment of the Court of Justice in the *Pfleiderer*[10] case, which arguably may have made the disclosure of leniency documents more likely. We note that the importance of the issue has also been recognised more widely across the European Union. First, the OFT and the other National Competition Authorities of the European Union have recently expressed this view collectively in a joint resolution on the importance of protecting certain leniency documents in private actions[11]. Second, partly as a result of the *Pfleiderer* case, the European Commission has said that is actively considering EU legislation to protect leniency documents from subsequent disclosure in court actions[12].

1.17. As stated above, the OFT considers that the proposals to strengthen private actions should complement rather than undermine public enforcement. On a practical level, the OFT considers that there should be provisions requiring parties to notify the OFT of CAT claims and giving the OFT intervention and/ or *amicus curiae* rights in the CAT. Such provisions already exist in relation to High Court actions raising competition issues and appeals relating to

[10] Judgment of the European Court of Justice in Case C-360/09 *Pfleiderer AG v Bundeskartellamt.*
[11] European Competition Network – Resolution of the Meeting of Heads of Competition Authorities of 23 May 2012 - *Protection of leniency material in the context of civil damages actions*, available at http://ec.europa.eu/competition/ecn/documents.html#resolutions.
[12] See DG Comp roadmap on Actions for damages for breaches of antitrust law, available at http://ec.europa.eu/governance/impact/planned_ia/roadmaps_2012_en.htm#COMP.

competition issues[13]. There should also be provisions clarifying the position if court proceedings are instigated whilst an OFT administrative investigation is proceeding in order to ensure the consistent and efficient application of competition law. Consistent with our 2007 recommendations, we consider that UK courts and tribunals should be required to have regard to UK NCA's decisions and guidance.

Costs and funding

1.18. We consider that the cost of competition private actions and the difficulties and risks in funding them are among the major obstacles to bringing such actions. We think that it will be crucial to the success of the Government's current proposals to enhance the competition private actions regime to ensure that costs and funding arrangements strike an appropriate balance between removing disincentives for claimants to bring meritorious claims and avoiding unfairness to defendants. This is an issue for all types of action and not just in the context of opt-out collective actions and SME fast-track actions as set out in the Consultation Document.

1.19. We consider that it would be appropriate to apply the existing position for cost-capping in civil claims to competition claims. There may also be merit in codifying the criteria and the procedure for costs-capping orders, so as to provide greater guidance on the circumstances in which an order will be granted and the likely contents of any such order. In this respect, in our view, it may be appropriate to consider requiring courts to have regard to the public interest in facilitating access to justice when carrying out such assessments.

1.20. We consider that not allowing contingency fees (or damages based agreements, 'DBAs') unnecessarily restricts the funding arrangements available to potential claimants. The Consultation Document expresses concerns arising from the fact that DBAs mean that lawyers' fees increase with the number of people who sign up to a case, for example the concern that DBAs may create incentives to artificially inflate the number of claimants. However, we consider that such issues could be addressed through safeguards such as strong court certification and supervision.

[13] See http://www.justice.gov.uk/courts/procedure-rules/civil/rules/competitionlaw_pd and http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part52.htm#IDASA2Y.

2. The role of the Competition Appeal Tribunal (CAT)

Enable courts to transfer competition law cases to the CAT, allow the CAT to hear standalone as well as follow-on cases and grant injunctions.

2.1. The consultation proposes to make the CAT a major venue for competition actions in the UK. We agree that the High Court should be able to transfer cases to the CAT but that it would be for the presiding judge to determine whether this would be appropriate in the circumstances of a given case. We query whether the CAT should become the exclusive venue for collective private actions, in particular given the lack of clarity as to the likely increase in volume of competition cases and whether the CAT would have sufficient resources to support this. In some cases, the High Court may be equally well placed to hear a collective action.

2.2. We support amending the Competition Act 1998 (CA98) to remove the requirement that civil actions brought before the CAT have to follow a prior administrative decision. We consider that this is consistent with the Court of Appeal's remarks in its judgment in the recent Enron[14] case, *'It seems somewhat anomalous that the specialist tribunal is entrusted with the decision as to infringement or not on an appeal from a regulator, but is not allowed to touch that question in a claim for damages*.'

2.3. We also recognise that injunctions are an important remedy. Applications for injunctions relating to breaches of competition law can currently only be made to the High Court. We strongly support the principle that the CAT should also be empowered to hear applications for injunctions in competition law cases. Furthermore, we consider that, whether in fast-track cases or otherwise, it is important for the threshold for granting interim injunctions to include provisions enabling the CAT to require the claimant to give cross undertakings in damages in appropriate cases, as is the established court practice for granting interim injunctions in civil cases more widely. There may be significant risks associated with removing entirely the need for such cross undertakings. First, it may lead to a large number of claims which appear initially well founded at the application stage but ultimately prove to be unmeritorious. Second, it may infringe the respondent's fundamental rights of defence. That said, we recognise that there may be benefits in giving the CAT a discretion to limit cross undertakings in damages in certain cases.

[14] *Enron Coal Services Ltd (in liquidation) v English, Welsh and Scottish Railway Ltd* [2011] EWCA Civ 2, paragraph 143.

2.4. More generally, we consider that if the CAT's jurisdiction is expanded it will be important to ensure that the CAT has sufficient resources to deal with any increase in cases that is likely to result. Also, we note that there is a need to harmonise the limitation periods and other relevant procedural rules between the CAT and the High Court to allow these proposals to work effectively. Finally, we note the possibility that there may be issues to consider from a procedural fairness perspective in circumstances where the CAT might hear different aspects of the same case, for example a warrant application and a substantive appeal or a standalone action and an appeal from an OFT decision. In a recent case, the French Commercial Supreme Court held that arrangements whereby the same chamber of the Paris Court of Appeals heard appeals on law and fact against decisions authorising search and seizure operations as well as decisions on the merits of the same case breached the right to a fair trial[15]. This might suggest that the CAT will need to develop detailed conflict of interest rules eliminating the risk of the same tribunal members being used at different stages of the same case.

2.5. As set out in more detail in Chapter 5 below, we consider that the proposals to strengthen private actions through widening the CAT's jurisdiction (or otherwise) must not undermine public enforcement. In a self-assessment regime, it is essential that businesses are provided with clear guidance on what does and does not breach the law so that they can achieve compliance with competition law. This may be undermined if discrepancies were to emerge between guidance and decisions issued by the national competition authority and judgments of the court. This reinforces the need to maintain an effective public enforcement regime in addition to improving the ability of those adversely affected by breaches of competition law to obtain redress through private actions. In that context, we think that it will be important to ensure there are provisions for the OFT (and CMA in due course) to be notified of CAT claims and to have intervention/*amicus curiae* rights (as it already does in relation to High Court actions and appeals)[16], as well as provisions to enable court proceedings to be stayed in appropriate cases where there are concurrent OFT administrative investigations and private actions. In addition we also consider that UK courts and tribunals should be required to have regard to UK NCA decisions and guidance.

[15] See the judgment of the Cour de Cassation in case [2011] V 10-21.103.
[16] See note 13 above.

Fast track procedure in the CAT to allow SMEs to resolve simpler cases more quickly and at lower cost

2.6. The OFT broadly supports the principle of introducing a fast-track procedure in the CAT and agrees that the focus should be on providing fast access to injunctive relief rather than damages. We also agree that recent experience of the Patents County Court tends to suggest that even comparatively complex legal and factual matters can in principle be dealt with relatively speedily. However, we consider that whether the fast track proposals will work in practice will depend on the detail of the proposals and, as set out above, it will be key to ensure that the CAT will have sufficient resources to deal with this additional caseload.

2.7. Moreover, we question whether the fast track procedure should only be available to SMEs. Other potential claimants – including for example consumer bodies and consumers themselves – may benefit from being able to pursue claims using the fast track procedure, in appropriate cases. We acknowledge that SMEs may well be key potential beneficiaries of a procedure that focuses on injunctive relief, but note that there may be occasions on which others such as consumers and consumer bodies may seek such a remedy too. By way of analogy, we note that the Patents County Court aims to provide cheaper, speedier and more informal procedures to both private individuals and SMEs and that it does not rule out hearing cases involving larger undertakings if one party is an SME[17].

2.8. We consider that although the fast-track procedure should in principle be beneficial, its success will depend on getting the practical details right. It would be damaging for the CAT and defendants if the fast-track procedure tied up resources in considering cases which were vexatious or lacked any merits. Equally, in light of the OFT's own experience of operating investigative procedures for competition law infringements which aim to ensure fair treatment of parties under investigation, we consider it important that the rights of the potential infringing party are sufficiently protected considering the complex nature of competition cases. Therefore we consider that it will be crucial to ensure the criteria for determining which claims are suitable for the fast-track are appropriate. Such factors might include the complexity, nature and value of the claim.

[17] See section 1.3 of the Patents County Court Guide, which is available at http://www.justice.gov.uk/search?collection=moj-matrix-dev-web&form=simple&profile=_default&query=patents+county+court+guide.

2.9. As regards complexity of claims, we note that even small competition cases involving SMEs can raise complex issues, which can be time consuming for all parties involved; see for example the *Terry Brannigan v OFT*[18] CAT appeal case. As was evident in this case, there are likely to be challenges in being able to deal with cases alleging abuse of dominance under Chapter II CA98/Article 102 Treaty on the Functioning of the European Union (TFEU) simply and quickly since many such cases can be very difficult to analyse in practice. We are also unclear how this fast-track procedure will work alongside the proposals for ADR since, if SMEs are expected to attempt an ADR procedure prior to using the fast-track route, this would slow down redress.

2.10. We discuss our views regarding costs and funding for private actions generally in Chapter 6 below. However, we note here that the Consultation Document considers costs-capping only in the context of the fast-track procedure. In our view, costs-capping should in principle be available for all types of action (although whether it is appropriate in individual cases may depend on the facts of the case to a greater extent in non-fast track procedures). As regards the level of any cost cap in fast-track procedures, we consider that the proposed £25,000 cap may be too high for SMEs as it could still deter them from seeking fast-track remedies in the CAT, unless the CAT routinely set a lower cap in individual cases. We also think that consideration should be given to how the CAT would handle applications for security of costs and, in respect of the legal insurance market, whether insurers would cover claims in a fast-track procedure.

2.11. As regards whether the damages available to a claimant should be capped, we agree that there may be a case for such an approach given the focus on interim relief and the light-touch nature of the fast-track procedure. However, capping damages may also deter certain claims, in particular cases where the remedy sought is final damages (for example because a claimant has gone out of business).

2.12. We do not support the proposed alternative option in which the fast-track procedure is preceded by a letter written by the OFT to the alleged infringer warning them that there is a reasonable case against them. This would divert resources away from enforcement and may lead to unclear outcomes as to the OFT's role where cases are not subsequently resolved through the courts.

[18] See http://www.catribunal.org.uk/238-635/1073-2-1-06-Terry-Brannigan.html.

Rebuttable presumption of loss for cartel cases

2.13. The OFT supports the proposal to introduce a rebuttable presumption that the overcharge resulting from cartels is 20 per cent. In principle, it should make claims more straightforward for claimants, who may find it difficult to prove the level of overcharge that resulted from the cartel activity. This may be the case for example where there is no pre-existing evidence on the precise level of overcharge, and where claimants may find it difficult to estimate the overcharge even if provided with access to the parties' relevant material through the court disclosure process. A rebuttable presumption would shift the burden of proof to defendants to demonstrate that the actual overcharge was lower than the 20 per cent presumed figure. A rebuttable presumption might also be beneficial if it facilitates litigation settlements in appropriate cases.

2.14. We understand that in Germany, whilst there is a presumption that hardcore cartels will lead to a price increase unless there are exceptional circumstances, the exact amount or percentage is not specified. Unless differences in the application of this presumption are addressed at European level as well, there will always be a risk that inconsistencies between Member States would undermine the effectiveness of the overall EU regime. We note that the 2012 Study on collective redress in anti-trust requested by the European Parliament[19] considers that establishing presumptions or easing the burden of proof of the claimants in collective actions is likely to distort the outcome of the trial and encourage unmeritorious claims. Therefore, we consider it important that the other safeguards to prevent vexatious claims proposed in the Consultation Document are implemented fully if this presumption is introduced.

2.15. We understand that claimants would be free to adduce evidence that the overcharge was higher than 20 per cent in an individual case, as well as defendants being allowed to rebut the presumption by showing that the overcharge was smaller than 20 per cent. This is particularly important as we note the evidence to support the figure of 20 per cent is based on findings in the economic literature that the median number of overcharges is around 20 per cent. However, this figure should be treated with caution. In particular, given that there is large variance, 20 per cent will not always be the actual overcharge – it may be higher or lower in individual cases.

2.16. There are also practical challenges that will need to be considered, for example how the principle would work in a case where there are indirect and direct

[19] European Parliament Directorate-General for Internal Policies, *Collective Redress in Antitrust – Study*, June 2012 (IP/A/ECON/ST/2011-19)

purchaser claimants and, as a result, how the presumption would interact with the passing on defence discussed below in paragraph 2.17. Also, we note that the definition of the term 'cartels' in the Consultation Document (as any breach of the Chapter I prohibition or European equivalent) is wider than is usually understood in competition law. For example, a selective distribution agreement could in principle infringe the Chapter I prohibition or Article 101 but would not generally be thought of as a cartel.

Address the passing-on defence in legislation

2.17. The OFT supports BIS' proposal not to address the passing on defence in UK legislation. As noted previously in our 2007 recommendations, the OFT considers that the class of claimant that could start proceedings should not be limited to only direct purchasers. However, it would in our view be most appropriate for this issue to be dealt with at European level, as inconsistencies between Member States would likely undermine the effectiveness of damages actions regimes throughout the EU. We also note that since the EU has not yet taken forward concrete proposals on private actions, it would be difficult for any UK measures to anticipate and be consistent with any future EU measures.

2.18. Furthermore, we agree that if the proposals in the Consultation Document on collective actions are taken forward (see Chapter 3 below) it will be important to consider mechanisms for the consolidation of cases and apportionment of damages among direct and indirect purchasers to ensure that those who have suffered loss are adequately compensated and that defendants do not have to pay multiple damages if both direct and indirect purchasers separately bring successful damages actions in respect of the whole of the defendant's overcharge.

3. Collective Actions

Opt-out collective actions regime

3.1. The OFT strongly supports the possibility of opt-out collective actions to allow businesses and consumers to obtain redress in both follow-on and stand-alone cases. This should help overcome what appears to have been one of the key barriers to effective collective actions to date, specifically that it has been very difficult to get sufficient claimants to make commencing an action viable, particularly for consumers or SMEs and/ or where the value of the claim is small compared to the costs of bringing the claim.

3.2. We also recognise the importance of having appropriate safeguards to avoid abusive litigation, in particular:

- strong court certification that the case is an appropriate one for collective action;
- that the representative body is suitable;
- that there is a reasonable prospect of success;
- clear retention of the loser pays principle although some costs capping may be appropriate; and
- punitive damages, for example treble damages, should not be allowed save in exceptional cases[20]; rather, damages should be allowed on both a compensatory and restitutionary basis as appropriate depending on the circumstances of the case.

3.3. We discuss our views on costs and funding in more detail in Chapter 6 below. However, we consider that not allowing contingency fees (or DBAs) unnecessarily restricts the funding arrangements available to potential claimants. In our view, the concerns about DBAs highlighted in the Consultation Document can be addressed by appropriate safeguards.

3.4. We support the recommendation that any unclaimed sums be paid to the Access to Justice Foundation as previously recommended by the Jackson Review of Costs, the Civil Justice Council and the HMT Financial Services Rules Committee.

3.5. We also agree that appropriate court certification and case management can mitigate the risk that cases become vehicles for anti-competitive information sharing.

3.6. We query whether only the CAT should hear collective actions as the High Court may be equally well placed in some cases. If arguments are based on costs (especially for smaller/ simpler claims), it should not necessarily be assumed that the CAT will be cheaper than the High Court for collective actions without data to support this. However, we agree that either court should have the discretion to determine whether an opt-out case is appropriate in the circumstances.

[20] We note that the CAT recently awarded exemplary damages in relation to conduct it found particularly 'outrageous' in its judgment in *2 Travel Group plc (in liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19.

3.7. As previously set out in our response to the EU consultation on collective redress[21], we consider that bodies permitted to bring collective actions must be credible, reputable and committed to acting in the interests of those they represent. Representative bodies could be certified either on an ongoing basis because they have met pre-determined criteria or by the court to deal with a specific case. In either case the criteria to be applied when authorising these bodies should be objective, transparent and non-discriminatory.

3.8. We also agree that restricting standing so that only the OFT could bring opt-out collective actions would unnecessarily restrict the cases which could be brought, would not make best use of the OFT's resources and could threaten the leniency regime.

4. Encouraging ADR

Whether ADR should be made mandatory

4.1. The OFT supports encouraging parties to consider ADR on a voluntary basis rather than making it mandatory and the recognition in the Consultation Document that encouraging ADR must sit alongside a more credible and effective judicial route to redress. Otherwise, there may be insufficient incentives for potential defendants to engage in ADR in good faith, which in a system with a greater ADR focus could actually weaken the redress regime overall. We consider that any changes to encourage ADR in CAT proceedings should be consistent with the 1999 Woolf reforms to civil litigation, under which parties in High Court competition claims are already expected to consider ADR before commencing court proceedings.

4.2. We consider that the CAT should consult with the OFT in relation to any pre-action protocols it develops to ensure a consistency of approach. As explained in more detail in paragraphs 5.5 to 5.8 below, we also consider that there should be provisions giving OFT specific intervention/*amicus curiae* rights in the ADR process.

OFT given powers to order redress schemes or certify voluntary redress schemes

4.3. The OFT supports the proposal that it be given a role to facilitate voluntary redress schemes, where the businesses in question are willing to provide redress to those adversely affected.

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[21] See *OFT response to the EU consultation on Collective Redress – Towards a coherent European approach to collective redress* (19 May 2011). This is available on the OFT website at www.oft.gov.uk.

4.4. However, the OFT has significant concerns about the practicality of a power to order businesses to take steps to make redress to those that have suffered loss due to their anti-competitive behaviour. We are concerned that a compulsory power may take up considerable time and resources in ensuring that potentially unwilling businesses implement a redress scheme in an appropriate manner that delivers adequate redress to those who have suffered loss. The OFT considers that such a mandatory power would be best exercised by a court, with appropriate sanctions available to those who did not comply with the court's order. Otherwise the devotion of resources by the OFT to the use of this compulsory power may be at the cost of the OFT's other functions. If BIS were to maintain its proposed mandatory power for the OFT to require undertakings to set up redress schemes, the OFT considers that it would require substantial additional resources to perform this role.

4.5. A role to facilitate redress should not be regarded as a substitute for encouraging private actions, since without the credible threat of private damages actions, businesses may be very unwilling to cooperate with a redress scheme. The redress scheme should also be independent of any other fines or sanctions that may be imposed for a breach of competition law, although as set out below we do not rule out penalty reductions in individual cases.

4.6. In order to avoid these potential adverse effects, we consider it important that the OFT would be able to approve such a scheme on a relatively high-level basis rather than, for example, to monitor the practical operation of the scheme. Furthermore, we consider the following aspects set out in the Consultation Document are very important:

- the OFT is not required to facilitate voluntary schemes, but rather that the power is discretionary;
- the OFT would not be required to quantify individual loss rather undertakings would need to devise the redress to be provided under the scheme according to certain broad parameters;
- a decision to refuse to facilitate a voluntary scheme would not be appealable.

4.7. We recognise that further work/detail is required to ascertain whether it will be possible in practice to achieve these aims even if the proposals are limited to voluntary redress schemes.

4.8. Consistent with our October 2011 consultation on revised penalties guidance, we consider that providing redress may be treated as a mitigating factor warranting a modest penalty reduction (5 to 10%) in appropriate cases.

5. Complementing the Public Enforcement Regime

Protection of leniency regime

5.1. The OFT welcomes the recognition in the Consultation Document that it is important to ensure leniency recipients are not in a worse position in private actions compared to other parties to an investigation because they have applied for leniency and had to create documents for this purpose. Therefore, we strongly believe that it is crucial that: (i) protection is given to leniency documents which are appropriately defined (including documents that are created specifically for the purposes of applying for leniency, such as corporate statements / admissions); and (ii) joint and several liability is removed from, at the very least, undertakings that are granted Type A immunity.

5.2. We think that these proposals are more important than ever given that the recent judgment of the Court of Justice in the *Pfleiderer*[22] case may have made the disclosure of leniency documents more likely. We note that the importance of the issue has also been recognised more widely across the European Union. First, the OFT and the other National Competition Authorities of the European Union have recently expressed this view collectively in a joint resolution on the importance of protecting certain leniency documents in private actions[23]. Second, partly as a result of the *Pfleiderer* case, the European Commission has said that is actively considering EU legislation to protect leniency documents from subsequent disclosure in court actions[24].

5.3. We recognise that there may be limits on the practical benefits of removing joint and several liability from immunity applicants since it is unclear how UK legislation would protect a UK undertaking from a contribution order made in a court in another jurisdiction. However, it should be of benefit in respect of UK actions. We do however recognise that there could be benefits if this was also dealt with at European level to avoid inconsistent application of these provisions across EU Member States. We also recognise that further consideration will need to be given as to how this will work in practice (e.g. at what stage and by what means the removal of joint and several liability will be confirmed).

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[22] Judgment of the European Court of Justice in Case C-360/09 *Pfleiderer AG v Bundeskartellamt.*
[23] European Competition Network – Resolution of the Meeting of Heads of Competition Authorities of 23 May 2012 - *Protection of leniency material in the context of civil damages actions*, available at http://ec.europa.eu/competition/ecn/documents.html#resolutions.
[24] See DG Comp roadmap on Actions for damages for breaches of antitrust law, available at http://ec.europa.eu/governance/impact/planned_ia/roadmaps_2012_en.htm#COMP.

5.4. We consider that joint and several liability should also be removed from Type B immunity parties in recognition of the value such undertakings add to the OFT's investigations. Furthermore, we can see advantages for the leniency programme in providing additional incentives for non-immunity leniency parties by removing joint and several liability from them also. At the same time, we also recognise that such an approach might make it more difficult for injured parties to gain redress and could impact on deterrence. We therefore consider that the issue is finely balanced and should be considered very carefully in the light of the evidence BIS receives on this issue from respondents to the consultation.

Other interactions between public and private enforcement

5.5. The Consultation Document notes that there is no direct interaction between the separate decisions that competition authorities and courts hearing private actions deliver, leading to the possibility of inconsistency between the two. The OFT agrees that good coordination between courts and competition authorities can address certain problems in this area, however specific provisions need to be made to ensure legal certainty. This is particularly important in light of the OFT's views on the importance of effective interaction between public enforcement and private actions already noted in Chapter 1 above.

5.6. In a self-assessment regime, we consider it is essential that businesses are provided with clear guidance on what does and does not breach the law so that they can achieve compliance with competition law and to enhance deterrence. Therefore we think it is important that the proposals ensure that possible discrepancies between guidance and decisions issued by the national competition authority and judgments of the courts are avoided. A significant switch to the use of standalone actions before the courts (fast track or otherwise) instead of public enforcement may increase the risk of such discrepancies. Also, there is an argument that assessing and developing competition policy may fall more naturally within the remit of competition authorities rather than courts.

5.7. The OFT considers that there should be provisions similar to existing provisions in the High Court and Appeals Practice Directions for cases raising competition issues[25] for all actions brought before the CAT as well as in ADR processes. These would include a requirement that the OFT (and CMA in due course) is notified of CAT claims and giving the OFT specific intervention/*amicus curiae*

[25] See http://www.justice.gov.uk/courts/procedure-rules/civil/rules/competitionlaw_pd and http://www.justice.gov.uk/civil/procrules_fin/contents/practice_directions/pd_part52.htm#IDASA2Y.

rights in respect of these claims. Furthermore, as set out in our 2007 Recommendations to Government, we consider that a provision should be introduced into the CA98 requiring UK courts and tribunals to have regard to UK NCA's decisions and guidance when determining competition issues.

5.8. There is a risk of inconsistent decision making and inefficient use of resources if an administrative investigation is carried out at the same time that court proceedings are brought in relation to the same infringement. Therefore Article 16, EC Regulation 1/2003 provides that national courts may stay proceedings if the European Commission is already investigating. This is reflected in the High Court Practice Direction for cases raising competition issues in relation to decisions of the European Commission. Equally, we consider that there should also be provisions to allow for court proceedings to be stayed when there is a pending OFT investigation to ensure that there is no inconsistency in the application of competition law in relation to the same case.

5.9. The Consultation Document also notes the European Commission's view that the decisions of all NCAs' competition authorities should be binding on the courts of Member States, to enhance cross-border private actions, but it does not propose to make any changes in this area. The OFT agrees with the European Commission that there may be merit in making decisions of other NCAs binding on all Member State courts, although we recognise there will be challenges in developing such an approach, in particular due to concerns over the difference between the legal rules / framework across the Member States on important issues such as privilege or judicial review. However, we consider that any such changes are better considered at European rather than national level.

6. Costs and funding

6.1. We consider that the cost of competition private actions and the difficulties and risks in funding them are among the major obstacles to bringing such actions. The need to make competition private actions cheaper, faster and more straightforward underpins the proposals in the Consultation Document. However, discussion of specific costs and funding arrangements are relatively limited, arising only in the context of the proposed fast track process for SMEs and in relation to opt-out collective actions. However, in our view, costs and funding arrangements are important issues more generally. We think that it will be crucial to the success of the Government's current proposals to enhance the competition private actions regime to ensure that costs and funding

arrangements strike an appropriate balance between removing disincentives for claimants to bring meritorious claims and avoiding unfairness to defendants.

6.2. Our 2007 discussion paper and recommendations set out detailed reasoning and conclusions on a number of aspects of costs and funding, which continue to represent our views on the issues in question[26]. We therefore do not intend to repeat them here. However, we consider that it is appropriate to make observations on two particular aspects of costs and funding here.

6.3. The first point is in relation to costs-capping, which the Consultation Document discusses in the context of designing an opt-out collective action regime and in the context of SME fast track actions. There are particular considerations around costs-capping in relation to these proposals but we consider that this issue is potentially relevant to all types of action. As regards the approach to this issue more generally, we consider that the existing position in civil claims, where costs generally follow the event but courts have wide discretion to depart from a strict application of this rule and make a costs order which is fair and reasonable in the circumstances of each case, is appropriate.

6.4. However, we consider that there may be merit in codifying the criteria and the procedure for costs-capping orders, so as to provide greater guidance on the circumstances in which an order will be granted and the likely contents of any such order. For example, criteria might include an assessment of the extent to which a meritorious claim relating to potentially significant harm might not proceed without such an order and list the type of factors that would be relevant to calculating the appropriate level of cap for the costs. Such an approach would provide claimants with certainty as to their potential exposure if the case is lost. In the absence of such certainty, meritorious cases may not be brought given the risk of a claimant having significant costs exposure towards a defendant.

6.5. As regards the assessment of whether costs-capping orders are appropriate in a given case, in our view it may be appropriate to consider requiring courts to have regard to the public interest in facilitating access to justice. Where the choice is between allowing anti-competitive behaviour to continue and capping the costs liability of claimants of small financial means to facilitate their access to justice, it is likely to be in the public interest for the latter to occur. Such an approach may help to ensure that costs-capping is not seen as so exceptional

[26] See Chapters 5 and 8 respectively of OFT 916 and OFT 916resp, '*Private actions in competition law: effective redress for consumers and business*'; Discussion paper (April 2007) and Recommendations from the Office of Fair Trading November 2007). These are available on the OFT website at www.oft.gov.uk.

that it never occurs in practice. The 'public interest' dimension may be particularly relevant in follow-on representative actions where it is clear that the defendant has infringed the law. It may in some cases be appropriate to cap the claimant's liability for the defendant's costs at zero, thereby achieving cost-protection, since otherwise the alternative may well be that no action is brought at all or only a small number of those who have been harmed are compensated.

6.6. The second point is in relation to contingency fees (or DBAs). We consider that this is an issue that should be addressed in relation to all actions, not just opt-out collective actions. The Consultation Document discusses DBAs in relation to collective actions and proposes that they should not be allowed at all. We consider that such an approach unnecessarily restricts the funding arrangements available to potential claimants. More specifically, we note that there are already significant issues with funding competition cases owing to the complex nature of competition cases and the relatively high level of risk associated with many such claims. We consider that taking a stricter approach than is permissible in civil cases more generally would be inappropriate[27]. In our view, the concerns about DBAs highlighted in the Consultation Document can be addressed by appropriate safeguards, such as strong court certification and supervision.

[27] The review of funding in the wider civil justice system carried out by Lord Jackson found that DBAs as an additional funding mechanism might have benefits including increased access to justice. The Government's response to the report accepted Lord Jackson's view, finding that '*Successful claimants will recover their base costs (the lawyer's hourly rate fee and disbursements) from defendants as for claims, whether funded under a CFA or otherwise, but in the case of a DBA, the costs recovered from the losing side would be set off against the DBA fee, reducing the amount payable by the claimant to any shortfall between the costs recovered and the DBA fee.*' See paragraph 13 of the Government's response, available at http://webarchive.nationalarchives.gov.uk/20111121205348/http://www.justice.gov.uk/consultations/jackson-review.htm.

Olswang LLP

OLSWANG

BIS Consultation - Private Actions in Competition Law: Consultation on Options for Reform (April 2012)

Response from Olswang LLP

The Competition and Regulatory team at Olswang LLP regularly advises clients on litigating competition law issues and has acted in several high-profile competition cases in the High Court including *Attheraces Limited v the British Horseracing Board [2007] EWCA Civ 38*, the leading case on excessive pricing, and *Bookmakers Afternoon Greyhound Services Ltd & Ors v Amalgamated Racing Ltd and Ors [2009] EWCA Civ 750* on exclusive licences.

We have also been involved in a number of regulatory disputes before the Competition Appeal Tribunal ("CAT") including the leading case on Ofcom's dispute resolution powers *T-Mobile (UK) Limited v Ofcom (Termination Rate Disputes)* [2008] CAT 12.

We agree that currently it is often neither affordable nor practical for small businesses who have suffered loss as a result of cartel activity or other competition law infringements to embark on competition litigation in order to recoup comparatively small amounts of damages. At the same time, the OFT's own resources are constrained, which leads to a situation where competition infringements go unchallenged and there is insufficient redress and deterrence.

The following sets out our response to the key proposals in the consultation.

I The role of the Competition Appeal Tribunal (CAT)

1. We consider the CAT to be a highly efficient and competent tribunal with effective case management and administrative support, genuinely expert panel members, and extremely user-friendly court facilities.

2. Provided the CAT receives sufficient additional resources to take on the extra workload, we strongly support the proposals to activate Section 16 of the Enterprise Act 2002 to enable the courts to transfer competition law cases to the CAT and to amend the Competition Act 1998 to allow the CAT to hear stand-alone as well as follow-on cases.

3. If such cases are to be heard at the CAT going forward, it is essential that the CAT is also empowered to grant injunctions. Swift action to suspend abusive behaviour is an essential remedy for the new entrant or smaller player who could go out of business in the time it would otherwise take for an action to reach court for a full hearing.

4. Aside from the benefits to the litigating parties of having their cases dealt with by the CAT rather than the High Court, concentrating the hearing of competition law cases in the CAT could be expected to further enhance the expertise of the tribunal panel members and produce a more consistent and coherent body of competition case law.

Fast track procedure for SMEs

5. The proposal for a fast track procedure in the CAT to allow simpler cases involving SMEs to be resolved more quickly and at lower cost has the potential to greatly increase the number of private competition actions being brought.

6. Provided those cases are meritorious (and an adequate system for screening cases at an early stage is essential), this should result in more competition law infringements being challenged, more chance that less well-resourced victims of anti-competitive behaviour will obtain redress and more diligent compliance in future by companies conscious of the increased likelihood of legal action by their customers.

7. However, there is clearly a balancing act to be struck between the interests of SMEs and the wider benefits to be gained from an increase in private actions on the one hand and the rights of the defence on the other. In particular, safeguards need to be in place to prevent groundless and opportunistic claims from wasting both the CAT's and defendants' time and resources.

8. If the fast track procedure involves a cap on a claimant's liability for the costs of the defence if he loses, there should be a corresponding cap on the defendant's liability for costs. In the context of the fast track only, and where costs are capped, we can also see merit in having a cap on or a reduction in the damages available if the claimant is successful in order to recognise the reduced risk to the claimant in bringing the case in the first place.

9. As long as claimants are still able to litigate in the normal way outside of the fast track procedure should they want to take a greater risk for a greater reward – we understand that to be the intention - they should not be prejudiced by the fast track proposals.

Rebuttable presumption of loss in cartel cases

10. As regards introducing a rebuttable presumption of loss for cartel cases, whilst this would undoubtedly facilitate follow-on actions and increase the number of private actions brought, this may tip the balance too far in favour of claimants. If a figure is also put on the presumed loss (the consultation suggests an assumption that prices have been inflated by 20%), this tips the balance even further in the claimant's favour as the defendant not only has to rebut the presumption of loss generally, but then has to argue down from the 20% starting point.

Passing-on defence

11. As for the passing-on defence, in our view, there is a case for directly addressing this in legislation, but this should wait for action at the European Union level.

12. It is essential that claimants know before commencing any legal action whether or not an infringing company can raise the passing-on defence in a claim for damages from a non-end-user. The requirement for a company of any size to show that artificially inflated prices have been absorbed and not passed on will be difficult to meet evidentially and will be likely to require the assistance of expert economists, which could easily deter or prevent actions being brought by SMEs altogether.

13. If the UK policy objective is to encourage SMEs and others to bring private law actions then a defence which will make it significantly harder for certain types of claimant to prove loss has the potential to undermine that policy.

14. Whilst case law will eventually resolve the passing-on issue, to ensure the right result from a policy point of view, legislation is required, and to ensure consistency across EU Member States, this should be addressed in legislation at the European Union level.

II Opt-out collective actions

15. Whilst the lack of participation in the Which? Football shirt case (where just 130 claimants (or 0.1% of those affected) opted in to the action and were awarded £20 each) may have been down to several factors which will not be present in all potential collective actions, it is still the only example of a collective action taken on behalf of consumers in the UK and we would agree that the result was not entirely satisfactory.

16. There is clearly little incentive on designated bodies in particular to bring follow-on damages actions in circumstances where the cost/benefit analysis after the event is as poor as it was in that case. We would therefore agree with Which? that the system needs to be changed to an opt-out regime.

17. We would also support proposals to extend the availability of collective redress to SMEs, sensibly defined, but larger well-resourced companies are unlikely to face the same hurdles and should not have the same advantages available to them.

18. Should opt-out collective actions be permitted, we consider that unclaimed damages should be returned to the defendant in order to give defendants sufficient incentive to settle and also to ensure that awards are only used to compensate victims and do not in effect punish defendants a second time (the first punishment having been meted out in the form of a fine by the relevant competition authority).

Funding arrangements

19. As far as funding such cases is concerned, we would agree that there is a danger in allowing *contingency fee* arrangements (whereby the law firm receives no fee if the case is lost or a percentage of damages if the case is won) as this has the potential to lead to divergence between the firm's interests and those of its client, who may be better served

by accepting an early settlement though this would have the effect of reducing the firm's fee.

20. However, if the recovery of success fees under the alternative *conditional fee* arrangements is also prohibited, this may deter law firms altogether from taking the risk on cases which cannot be funded by claimants other than on a no win-no fee basis. In lots of cases those potential claimants will be SMEs.

21. As the consultation acknowledges, if private actions are to be brought, lawyers have to be willing to bring them. Further consideration therefore needs to be given to clarifying the funding possibilities for collective actions and also for individual private competition law actions.

III Encouraging Alternative Dispute Resolution (ADR)

22. We consider that ADR should be facilitated and encouraged, but not made a mandatory requirement before court proceedings can be brought, as it may not be appropriate in all cases and requires a degree of cooperation on both sides, which may not be forthcoming from a cartelist or dominant firm stonewalling previous attempts to negotiate a settlement.

23. If ADR is to become a preliminary step in many competition private actions going forward, and private actions generally are expected to increase as a result of these reforms, there is likely to be a significant demand for ADR practitioners and venues. To ensure that the UK's competition regime continues to be held in high regard, consideration should be given to monitoring ADR providers taking on this role to ensure consistently high standards.

24. As for collective redress schemes, provided that there is some way of ensuring that all potential claimants are adequately compensated under a particular scheme, these have the potential to provide a highly cost-effective and far more simple and straightforward way for claimants to obtain redress.

25. We believe that SMEs in particular would overwhelmingly prefer making a simple application for compensation to such a scheme rather than face the unwelcome distraction of any kind of court proceedings, even where there is a possibility that a higher award might ultimately have been obtainable had legal proceedings been pursued all the way to trial.

26. The key issue is therefore how to ensure adequate compensation under the scheme where claimants may not yet be represented either individually or by a representative body, and where any representation that is in place could not speak for all claimants for whom the scheme would be relevant.

27. In those circumstances, it must be for the OFT or the relevant sector regulator making the infringement finding to assess the fairness of the proposed scheme or, as has been suggested in the consultation response of the City of London Law Society, for the OFT to approve various model redress schemes that defendants could then adopt.

28. Given the cooperation required of the cartelist(s) in any redress scheme, such schemes could only be voluntary. Aside from the incentive of potentially not having to engage in any or as much follow-on litigation, we agree that cartelists could be further incentivised to set up such schemes through a reduction in the fines imposed.

IV Complementing the public enforcement regime

29. There are clear benefits to the public enforcement regime of an increase in private actions and in particular in enabling SMEs to help themselves rather than rely on the authorities, not least that pressure on competition authorities to take on many individual cases that would otherwise go unchallenged might be reduced.

30. If more private law actions are brought, this should result in more competition law infringements being challenged, more chance that less well-resourced victims of anti-competitive behaviour will obtain redress and more diligent compliance in future by companies conscious of the increased likelihood of legal action by their customers.

31. In addition, there is currently comparatively little judicial precedent on the many unanswered legal questions in competition law compared to other areas of law, and it would be helpful for the competition authorities, and indeed for competition law practitioners generally, to have more cases and more judgments.

32. In conclusion, we would agree with the proposal in the Impact Assessment to choose Option 3 and to allow private opt-out collective actions in competition law, along with the proposed reforms to court jurisdictions, encouragement of ADR and the protection of public enforcement as set out in more detail in the consultation paper.

OLSWANG LLP (Howard Cartlidge, *Partner*, and Ginny O'Flinn, *Senior Associate*)

24 JULY 2012

Open Source Consortium

Private Action in Competition Law

A response to the consultation submitted by:

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The Open Source Consortium (OSC) is a trade association/special interest group

www.opensourceconsortium.org

Thank you for offering the opportunity to participate in this consultation. We understand that this consultation is essentially one discussing the advantages and disadvantages of legal approaches to achieving proper redress in competition law cases but hope that our consultation response will provide background material that will assist you in developing your conclusions. .

Our reply is mostly applicable to your last question. Accordingly we have not used your official response form.

We consider the issue of timely and cost effective private action to be particularly important to providers of services based on Open Source Software (OSS), arising from the nature of software generally and the low barrier to entry/exit model of OSS (also Free Software, collectively F/OSS) specifically.

Your records should show that our attempts to interest national regulatory bodies gives rise to the prioritisation problem – and this issue has never been a high enough priority.

The particular problem for F/OSS is that of interoperability and the wider market structures of the digital economy (we do not claim specialised expertise in either competition law or the economics of anti-trust but hope that we are sufficiently accurate to allow you to “interpret” where necessary).

The market structure problems for F/OSS lie in the network effect for software as the government itself recognised in BIS Economics Paper No 15 Innovation and Research Strategy for Growth[1]:

> Competitive markets are important for innovation to thrive and deliver growth. Competitive conditions [enable] allocation of resources from less to more efficient firms, [and] the freedom of consumers to choose new suppliers, often on the basis of new products and services. […]
>
> The relationships between competition and innovation are all the more complex as they are likely to differ across industries and sectors, and in some industries collaboration must be encouraged.
>
> With network externalities, for instance, the more users join a particular telephone network, the more valuable the network becomes to those users, as they are able to contact more people as the size of the user base increases. This can lead to very large market shares for leading firms and products and high barriers of entry.
>
> **ICT-enabled forms of collaboration […] exhibit scale economies. As virtual networks grow, the control of interface and compatibility standards, amongst other issues, also increase in importance.**

The network effect is particularly important when taken with the externalities that arise with the public sector "digital by default" (or, worse, digital by compulsion). We have written extensively on these externalities[2] [3] [4].

As well as looking for an opportunity to enable specific redress we believe that effective mechanisms for private action:

- provide an **institutional response** to the actions and behaviours, intentional or otherwise, of large undertakings in direct or parallel markets affecting F/OSS services.
- will **lead automatically** to **better working and more effective markets**.

1 http://www.opensourceconsortium.org/content/view/194/89/
2 http://www.opensourceconsortium.org/content/view/168/89/
3 http://www.opensourceconsortium.org/content/view/154/89/
4 http://www.opensourceconsortium.org/content/view/192/89

The possible of threat of action (analogous to threat of entry in the market place) is likely to lead to better outcomes for small firms (and consumers) as the actions of large undertaking are more likely to to take into account the potentially more immediate consequences of effective and timely private action compared to the long drawn out processes compared to the possibility of attracting the attention of regulatory authorities who eventually might decide the the aggregation of small issues will amount to something sufficiently important (see attachment).

These matters arise regularly – see appendix for one such example

Neelie Kroes discussed the difficulties in a speech on software and interoperability :

> "Complex anti-trust investigations followed by court proceedings are perhaps not the only way to increase interoperability. The Commission should not need to run an epic antitrust case every time software lacks interoperability.
>
> Wouldn't it be nice to solve all such problems in one go?
>
> Whereas in ex-post investigations we have all sorts of case-specific evidence and economic analysis on which to base our decisions, we are forced to look at more general data and arguments when assessing the impact of ex-ante legislation."

In all competition law matters, for the weaker smaller party being right doesn't add up to much. Time is of the essence.

The law suit initiated in Slovakia against the public administration and its software choices for on-line public services proves that it is possible to initiate action [5] for the SME undertakings involved but this is effectively a protest rather than an action for redress.

This was expressed in a more pragmatic way a report provided in relation to Civil Action 98-1233 (CKK) in the United States District Court of the District of Columbia[6]. The report relates to the effectiveness of the final judgment. As the report states the fundamental purpose of an anti-trust decree is “to ensure competition”[7] and quotes anti-trust scholar, Professor Herbert Hovenkamp[8]:

5 http://www.opensourceconsortium.org/content/view/198/89/

6 http://www.antitrustinstitute.org/Archives/First_on_EU_Microsoft.ashx retrieved 8 Nov 2008

7 Kathleen Foote, Office of the Attorney General of California, California Group's Report on Remedial Effectiveness, 30th August 2007

8 Quoting: New York v Microsoft Corp, 224 F.Supp.2d 76, 184 (D.D.C 2002)

> "The D.C. Circuit stated the goals for an antitrust remedy in *Microsoft.* It must "seek to 'unfetter a market from anticompetitive conduct,' to 'terminate illegal monopoly, deny to the defendant the fruits of its statutory violation, and ensure that there remain no practices likely to result in monopolization in the future..." [...] By the time each round of the *Microsoft* litigation had produced a "cure" the victim was already dead"

In general terms as the Office of Fair Trading publication "Services of General Economic Interest Exclusion"[9] (Section 1.9)

> The OFT will interpret the exclusion strictly. Undertakings seeking to benefit from the exclusion will have to demonstrate that all the requirements of the exclusion are met. In considering whether the exclusion applies, the OFT will, in particular, need to be satisfied that the undertaking has been 'entrusted' with the operation of a service of general economic interest, and that the application of the Competition Act prohibitions or Articles 81 and 82[10] would obstruct the performance, in law or in fact, of the particular task entrusted to it.

And in the discussion of the role of competition law in relation to the state (Section 2) OFT states, among other things:

> The policy of successive UK governments has been to expose the activity of parts of the public sector to competition or economic regulation, sometimes coupled with privatisation. It is therefore possible that, over time, functions that may once have been considered to be exclusively administrative or social will come to be regarded as economic.

9 http://www.oft.gov.uk/shared_oft/business_leaflets/ca98_guidelines/oft421.pdf
10 Now 101,102 TFEU http://europa.eu/legislation_summaries/competition/firms/l26092_en.htm

Analogous to CFI recognising[11] the parallel markets effect of Windows Media Player creating a requirement for the underlying Windows OS:

> by means of the bundling, Microsoft may expand its position in adjacent media-related software markets and weaken effective competition, to the detriment of consumers *(recital 982)*

if one is required to file online with HMRC (and other public sector bodies) and one is required to use a particular operating system[12] then similar issues arise.

These are not new issues and spread across the public and private sectors, but they are getting more problematic for the still emerging F/OSS sector in the UK.

Private actions should enable remedies that are meaningful to the complainant and not merely to create grist or succour for the underlying principle.

11 http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=T-201/04
12 http://www.opensourceconsortium.org/content/view/169/89/

Appendix – UEFI

An emerging problem for F/OSS is the future requirement for motherboards to used signed loading for newer versions of Microsoft operating systems[13] [14]

While we do not wish to infer that UEFI amounts to anti-competitive behaviour we can certainly see how it is going to present a future barrier to entry for SME F/OSS if not all market participants. We should not have to rely on the mechanisms such as the Open Innovation Network[15]. Meritorious though it is, at best its effect is akin to getting protection from one's elder sibling in the school playground, fine as long as it lasts. At worst is is a large firms club.

Our experience suggest that regulatory authorities prefer to deal on an outcome based approach rather than risk based issue avoidance.

13 http://www.opensourceconsortium.org/content/view/172/89/
14 http://mjg59.dreamwidth.org/9844.html
15 http://www.openinventionnetwork.com/

Orrick, Herrington & Sutcliffe LLP

ORRICK

Response to BIS consultation

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

A. INTRODUCTION

We welcome the opportunity to comment on the consultation paper. We acknowledge the scope for improvement of the current regime and we support efforts to reform the system. We have concerns, however, with regard to some of the proposals set out in the consultation paper, in particular those relating to collective actions and the introduction of a fast-track for SMEs.

By way of introductory comments:

- **Any changes to the English legal framework for antitrust damages actions should be carefully drafted to ensure consistency with EU law.**
- **The overall effect of a revised legal framework – notably, the impact on cartel deterrence and cartel leniency programs - should be assessed in detail to avoid an increase in private enforcement at the cost of reduced public enforcement.**
- **The Government should resist the temptation to introduce a piece of legislation which may promote certain policy objectives, such as an improved legal environment for SMEs, but which gets shot down and is rendered useless at its first encounter with an English or EU court. This is, of course, what happened to s.47A Competition Act 1998, the flagship legislation introduced in 2003 to promote private enforcement in the UK.**

B. THE COMPETITION APPEAL TRIBUNAL (Q.1- Q.3)

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

We are in favour of this proposal. See response to Q.2 below for further comments.

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

Yes. There are significant advantages in having a specialist forum such as the Competition Appeal Tribunal ("CAT") which understands complex competition issues and is familiar with handling large volumes of economic evidence. Currently, the CAT is not being used to best advantage. We note that, since January 2011, only one new follow-on action has been filed with the CAT.

There are a number of reasons for the unpopularity of the CAT, several of which are described in Section 4 of the consultation paper. In essence:

- The CAT's jurisdiction is limited by the fact that it can only take on damages actions brought on the back of infringement decisions issued by UK or EU competition authorities ("follow-on cases").

- Moreover, the ruling in *Enron v EWS (I)*[1] confirmed that the CAT has an extremely limited scope to find outside the original infringement decision. Any action brought before the CAT must be strictly limited to the findings in the underlying decision. This acts as a straitjacket on the claimant's ability to argue its case. *Enron v EWS (I)* reinforced this effect by confirming that the CAT will interpret infringement decisions narrowly. As a result, s.47A of the Competition Act has become a piece of legislation with little application, except that it allows an extended limitation period for claimants who are out of time in the High Court. Accordingly, s.47A should be disapplied and replaced by an alternative which does not distinguish between follow-on and stand-alone cases.

Limitation periods: In the event the CAT's jurisdiction is brought into line with that of the High Court, it would be appropriate also to harmonise their respective limitation periods. The High Court's six-year limitation period should not be changed, since this is a standard time limit across virtually all areas of litigation, not just antitrust. Instead, the CAT should have, we propose, two alternative limitation periods: (i) the High Court's six-year limitation period should apply in the CAT; and (ii) in addition, a two-year limitation period should apply starting from the time of the European Commission or the Office of Fair Trading's infringement decision. The two-year period represents a reduction to the CAT's current limitation period, which ends two years after the right of appeal has been exhausted, a system which, in practice, may give claimants up to a decade to bring a claim after they found out about the cartel or other underlying antitrust infringement. Arguably this creates unreasonable uncertainty for defendants and can easily be addressed by taking the start of the two-year period back to the date of the infringement decision.

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

We agree that, in order to strengthen the role of the CAT, it should be given the power to grant injunctions in support of proceedings. This is consistent with our suggestion to permit the CAT to hear stand-alone claims and to take on a role more similar to that of the High Court.

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

C. FAST-TRACK MODEL FOR SMALL AND MEDIUM ENTERPRISES (Q.4- Q.6)

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

We oppose the proposals to establish a fast-track model in the CAT for small and medium enterprises ("SMEs"). The consultation paper suggests that, under these proposals, fast-track cases would reach trial within a recommended time limit of six months. We do not believe that it would be possible to reach trial within this period without severely compromising quality and legal certainty.

Given the secretive nature of cartels, a claimant will have little chance to prove its case without disclosure, because virtually all relevant documents will be within the defendant's control. Any attempt to cut short the disclosure stage of proceedings would actively damage claimants' interests, including those of SME claimants, by making it more likely that crucial evidence of the cartel would be overlooked. Defendants would also suffer, as a carefully argued defence, together with disclosure, will be essential to address often complex areas of law, economics and facts. Moreover, parties should generally be encouraged to have a sensible discussion and reach agreement on how to limit the scope of disclosure to certain types of documents. A rushed timetable would prevent this and, as a result, the parties might end up taking a wider approach to disclosure than is necessary in the circumstances of the case, at considerably greater cost to the parties.

Moreover, antitrust judgments do not only determine the dispute at hand but can also bind parties to future proceedings, notably in abuse of dominance cases where a fast-tracked investigation involving only a superficial consideration of the issues would be capable of setting a binding precedent and could have a severe impact on the commercial strategy of some of the world's most successful companies. It is unrealistic to think that a judge could be presented with sufficiently robust evidence in six months to hold a company in abuse of a dominant position, when such decisions take six years for competition authorities to reach.

Furthermore, given the inevitably haphazard nature of any six-month antitrust damages action, this proposal would be contrary to the interests of justice and would risk undermining the excellent global reputation enjoyed by the English courts as a forum for international disputes where even unsuccessful litigants tend to feel, at the end of proceedings, that they have had a proper hearing. The fast-track proposal would move the judicial system closer to what is best characterised as a "flip-the-coin" system: whilst the process would be fast and cheap – certainly available to everyone - the outcome would be uncertain and parties are unlikely to be left satisfied that they have had their day in court.

The Government should also consider whether the proposed fast-track model might face legal challenges based on the fundamental right to a fair trial.

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

We oppose the proposed cap on claimants' liability for costs on the basis that it would put pressure on defendants to settle even weak claims. The alternative would be to run up costs which could not be recovered after trial, even if the claimant's case was found to be without merit. This would create the potential for businesses to be threatened with "blackmail suits", where claims are brought without sound basis in facts and evidence and where defendants may be reluctant – for reasons entirely unrelated to the case before the court – to have internal documents disclosed and read out in open court and to have senior management examined as witnesses.

Placing an emphasis on injunctive relief would not solve the problems referred to at Q.4 above, since the CAT would still need to consider the merits of the claim. Moreover, as injunctive remedies can seriously harm a defendant's business, taking damages off the table would in no way justify a lower level of scrutiny from the CAT.

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

An alternative may be to give the CAT wider powers, similar to those of the High Court under the Civil Procedure Rules, to manage and cap costs on an ongoing basis during proceedings. This would give the CAT the scope to protect SMEs from excessive costs whilst remaining more flexible than the fast-track model outlined in the consultation paper.

Separately, we consider that some SMEs may take an overly optimistic view of their own potential antitrust claims. This is often the result of viewing potential claims through too narrow a lens, for example, by failing to account for constraints on large companies coming from competitors or the threat of new market entry, for example from low cost manufacturers in Asia. The fact that many SMEs believe that they have legitimate antitrust claims does not mean that this is true in all cases. Caution is therefore required, particularly if other steps are going to be taken (such as the introduction of a fast-track for claims) which could constrain larger businesses from launching a solid defence.

D. PROVING DAMAGES (Q.7- Q.8)

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

Reversing the burden of proof in relation to loss could risk weighting the system too heavily against defendant businesses and might have the unintended consequence of discouraging cartel whistleblowers. Claimants already have tools under English law to assist them in proving damages, including a wide duty of standard disclosure and the option to apply for specific disclosure.

We understand that several other EU Member States allow their courts a degree of discretion when it comes to the standard of proof for damage. In Austria, for instance, if the exact amount of damage is impossible or unreasonably difficult to establish, the judge may assess the damage on the basis of his "freier Überzeugung" (roughly translated, "free conviction"). Italian courts, meanwhile, will be permitted to carry out an equitable assessment where the existence of damage is not in doubt but it is not possible to prove the amount of the damages. Allowing the CAT to exercise this kind of discretion would allow for more flexible and tailored solutions than introducing a blanket presumption of loss.

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

We agree with the Government's position at paragraph 4.49 of the consultation paper that there is no strong case for addressing the passing-on defence in law at a national level. It would be preferable for this issue to be resolved at the EU level to ensure consistency across Member States.

E. COLLECTIVE ACTIONS (Q.9- Q.23)

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 clearly not working well, given that only one representative action has been brought to date. However, we recommend that BIS should reform the system without the introduction of opt-out collective actions.

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 strongly oppose extending the collective actions regime to include opt-out collective actions. Please see further comments below under Q.14.

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

We agree that it should be possible to bring collective actions on behalf of businesses as well as consumers, provided that this is accompanied by appropriate certification and case management. It is likely that this would increase take-up of collective actions, since businesses have a greater incentive to take steps against anti-competitive behaviour than individual consumers.

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

We do not consider this to be a major concern. Given the involvement of external antitrust counsel in any such action, we do not view opt-in (or opt-out) class actions as a risk area for cartels or other anti-competitive conduct, and we see no reason why the standard rules relating to information exchange should not be adequate in this context.

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

In theory, we do not see any reason to limit collective actions to follow-on cases. However, we would not expect there to be much appetite for stand-alone collective actions, given i) the difficulties involved in proving a claim where there is no existing infringement decision to rely on; and ii) the fact that public awareness of competition infringements is likely to be low unless a public enforcement decision has already been issued.

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

We are opposed to any proposals to allow opt-out collective actions. We consider that these would give rise to a number of issues, many of which are referred to in Section 5 of BIS' consultation document. Here we focus on one of those, namely the strong likelihood of overcompensation resulting from such claims, since, no matter how well the collective action is publicised, far from everyone within the class of potential claimants will come forward. This leaves the question of what to do with unclaimed funds, which is likely to be controversial. BIS discusses a number of possible options in Annex A to the consultation paper. We consider, however, that all of these options are problematic to a greater or lesser extent.

We agree with BIS that redistribution of surplus damages to existing claimants would not be desirable. It would result in individual claimants receiving compensation in excess of the level of damage that had been shown in court, and so would infringe the fundamental principle of English law that claimants should not be enriched by damages actions.

We also agree that unclaimed funds should not revert to the defendant. In a situation where large sums in damages were unclaimed and reverted to the defendant, resulting in a minimal change in position, it would be hard to avoid the perception that the action was an unjustified waste of time and costs.

BIS inclines towards the view that unclaimed sums should be paid to a single specified body, which it argues is important in order to maximise deterrence. We are, however, uncomfortable with this reasoning. There is already an adequate mechanism to punish businesses which are found to have infringed competition law, through the imposition of cartel fines by the UK's Office of Fair Trading ("OFT"), and an uplift for deterrence is built into the way in which the OFT calculates those fines. There is therefore no need to impose a further mechanism for

deterrence by retaining sums which have not been claimed by members of the class[2]. Moreover, if nobody comes forward to claim a sum of damages in compensation for their loss, then the retention of those damages arguably becomes punitive rather than compensatory. This challenges the fundamental principle of English law that damages are aimed only at compensating loss, and could almost be seen as exemplary damages by the "back door".

We are also unconvinced that it is the function of private damages actions to serve wider social purposes such as advancing access to justice, as is suggested by BIS. On the contrary, private damages are a matter between the parties to the action.

In the end, the groups that would benefit from an opt-out system would be class-action lawyers and funders. The cost claims are likely to be high: in a recent case before the United States District Court, Northern District of California, the class action lawyers claimed $100 million in costs. We would advise the Government to consider carefully whether this is a cause worthy of legislation.

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

We do not agree that opt-out collective actions should be permitted but, if they were, stringent criteria for judge-led certification would be necessary. Otherwise, claims with no real prospect of success could reach trial, resulting in a considerable waste of time and expense. The suggested list of issues for certification is broadly equivalent to the qualification criteria used in Canada, which are generally regarded as being effective.

Another issue to consider is whether court approval should be required to dismiss a class action after it has been filed if the claimants decide not to move forward with the claim. This is required in the U.S. where it acts as a disincentive for claimants to file class actions without proper assessment being given to the merits of the claim.

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

Treble damages should be prohibited in any event. The current principle that claimants should not be enriched through damages actions provides a disincentive to litigation brought without a sound foundation. We note that Australia, for instance, allows opt-out collective actions but is regarded as having avoided a US-style litigation culture, at least in part because its legal system does not allow for treble or punitive damages in competition law actions. Further, in the UK, there is already a mechanism for punishment of competition law infringements, namely the ability of the OFT to impose fines. There would be a very real risk of "double"

[2]In viewing the purpose of private damages actions as compensation, not deterrence, we are broadly in line with the European Commission's position. In its *White Paper on Damages actions for breach of the EC antitrust rules* (2008), the Commission stated that the first and foremost guiding principle of private damages is full compensation for victims (p. 3). "Compensatory justice" (to use the Commission's phrase) may inherently produce other beneficial effects, such as deterrence of future infringements, but these are secondary to the compensatory principle.

punishment of businesses if they could be subjected to both cartel fines and punitive damages.

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

Yes, this rule should be maintained. It provides an important safeguard against the temptation for claimants to speculate by bringing claims which have a low prospect of success. The risk of an adverse costs order compels claimants to consider whether an action genuinely has a good prospect of success. The same applies to insurers brought in by claimants. If the claim does not have a good prospect of success, the claim may well be – and indeed should be – dropped due to the cost exposure. The threat of an adverse costs order therefore acts as a filter against claims which lack a solid foundation.

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 stated in our answer to Q.9 above, we would be in favour of allowing the CAT a wider discretion to cap costs where necessary to protect SMEs from excessive costs.

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

We believe that contingency fees should be permitted in collective action cases, since they have the potential to facilitate access to justice. Care should, however, be taken in deciding which forms of contingency fee agreements to allow in this context, as some will carry greater risks than others. It is also important to analyse the overall effect of any changes to the legal framework for antitrust damages actions, to ensure the incentives for claimants to litigate do not become too strong. As noted above, the "loser pays" rule should not be changed.

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?**

If this system were adopted, we consider that any unclaimed sums should be paid to the Treasury rather than making a choice of charity. This would mirror the EU system where cartel fines are currently paid into the Community Budget[3].

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 unclaimed sums were to be paid to a charitable body, they ought to be paid to a charity related to the industry affected by the cartel. However, as stated above, we consider that a

[3] See http://ec.europa.eu/budget/explained/budg_system/financing/fin_en.cfm.

more appropriate solution, and one which is in line with EU practice, would be for unclaimed sums to revert to the Treasury.

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

We do not consider that it would be appropriate to give the OFT the power to bring opt-out collective actions. This would be an inefficient use of the OFT's time. The OFT will be of greater assistance to private enforcement if it continues to concentrate on investigating and exposing cartels and abuse of dominance, thus alerting potential claimants to infringements which may have affected them, as well as relieving claimants of the burden of proving the antitrust infringement.

We also anticipate that, for reasons of time and expense, there will be little appetite to bring claims from consumer watchdogs and industry associations. These bodies are set up to represent the interests of consumers by lobbying legislators or influencing other decision makers and to advise the general public. They are not, however, set up to handle complex litigation and, indeed, such operations would be entirely foreign to their experience. In reality, such bodies would appoint a law firm effectively to run the litigation, and this law firm would presumably exercise heavy influence over any decisions made as to the course of the litigation. Thus, the difference between letting a law firm represent a class and having a consumer or trade association act as plaintiff would, in any practical sense, be limited. Giving the power to bring class actions to consumer bodies would, in practical terms, do little to mitigate concerns arising from a situation where law firms represent opt-out claims.

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

Please see our comments under Q.22 above.

F. SETTLEMENT AND REDRESS (Q.24-30)

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

We agree that alternative dispute resolution ("ADR") should be encouraged in private competition actions, but oppose any attempt to make it mandatory. ADR will not be suitable in all circumstances and it should not be imposed on parties where positions are entrenched and it has minimal chance of success. Moreover, compulsory ADR would take time and would appear to be at odds with the plan to fast-track claims by SMEs.

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

We do not object to the introduction of a simple pre-action protocol for some or all cases in the CAT. This would encourage dialogue between parties to potential actions and could facilitate an early resolution to the dispute. Moreover, as we mention above, some potential claimants, especially SME claimants, may have an unrealistic view of the merits of their claim and their prospects of success. A pre-action protocol, by encouraging early information exchange, could enable SMEs to form a more realistic view of the strengths and weaknesses of their claim, perhaps saving them unnecessary litigation.

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

The current obligation, under Rule 43 of the Competition Appeal Tribunal Rules 2003 (as amended), to keep a settlement offer open until 14 days before trial acts as a disincentive for defendants to make settlement offers at the early stages of the litigation. At such point, critical elements of the litigation, such as disclosure and the exchange of witness statements, will not have been completed, and there may still be significant uncertainty as to the outcome of the litigation. This will discourage defendants from making formal settlement offers because, if the defendants' position improves substantially following disclosure, they may nevertheless be bound by an offer which is overly generous to the claimants.

The introduction of a parallel provision to CPR 36 would be an improvement on the CAT's current regime.

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

We have no such proposals.

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 or collective settlement in the field of competition law?**

We do not agree that this is necessarily the case. BIS's proposal that a business which wishes to settle on a collective basis could get the representative body to bring a collective action in the CAT, which could then proceed to settlement, seems unnecessarily cumbersome.

If a collective settlement mechanism were to be introduced, the model adopted in the Netherlands appears to be a good one. The requirement for the parties to the settlement to jointly petition the Amsterdam court to certify the agreement appears to be a good way to ensure that individual interests are not abused.

One issue that would need to be resolved, however, is whether a collective settlement agreement in the UK would be enforceable in other jurisdictions. The Dutch model, under which several international collective settlements have been declared binding by the Dutch court, indicates that it could be. However, it may be more appropriate for this issue to be dealt with at EU rather than UK level.

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

We are opposed to this proposal. The OFT's role is to investigate and, where appropriate, penalise infringements by imposing fines. Private enforcement plays an important, but distinct, role in allowing compensation of parties who have suffered harm from competition law infringements. We are against any attempt to blur the distinct functions of the OFT and private enforcement by trying to involve the OFT in redress.

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

No. As we state under Q.29 above, the issue of redress should be kept completely distinct from fines, not least to avoid confusion and unnecessary complexity.

The current complementary nature of the OFT and the private enforcement regime generally works well. Any change to this system would risk overstretching the OFT and prejudicing its capacity to carry out its current functions.

G. OTHER ISSUES (Q.31- 34)

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

There is a tension between extended private enforcement and the public enforcement regime. If the private system is regarded as too claimant-friendly, cartel participants may be discouraged from making leniency applications and regulators will lose a vital source of intelligence about cartels. At present, we are satisfied that there are still strong incentives to make a leniency application, but a number of the changes discussed above, such as opt-out collective actions, could shift the balance too far. Again, it is critical to assess the overall effect of any changes to the legal framework.

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 take the view that the Government should avoid legislative solutions in relation to the disclosure of leniency documents. This is an area where consistency with the EU is important. It is more appropriate for this to be a court-led process and, indeed, this point has already been made in the EU courts. The European Court of Justice ("ECJ") held, in its preliminary

ruling in the case of *Pfleiderer*[4], that it is for the courts and tribunals of the Member States to determine, on the basis of their national law, the conditions under which access to leniency documents must be permitted or refused. In doing so, they must weigh the different interests protected by European Union law, namely i) the right of persons harmed by competition infringements to seek redress and ii) the need to ensure the utility of leniency programmes. This approach was applied by the Commission in submissions to the High Court[5], and subsequently in the judgment of Mr Justice Roth[6], in proceedings arising from the gas insulated switchgear cartel.

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?**

This would provide a very strong incentive for parties to come forward with information about cartels. However, the incentives to blow the whistle are already strong and it is not clear to us that there is any real need to strengthen them further. If such protection were introduced, it should not be applied retroactively and, at most, should be extended only to the first cartel participant to come forward with information i.e. the immunity applicant.

Orrick, Herrington & Sutcliffe (Europe) LLP
20 July 2012 (DXL/RYD)

[4] *Pfleiderer AG v Bundeskartellamt* (Case C-360/09), judgment of the ECJ dated 14 June 2011.

[5] Observations of the European Commission pursuant to Article 15(3) of Regulation 1/2003, submitted in relation to *National Grid Electricity Transmission plc v ABB Ltd and others* (Claim No. HC08C03243).

[6] Judgment of Mr Justice Roth dated 4 April 2012 in *National Grid Electricity Transmission plc v ABB Ltd and others* [2012] EWHC 869 (Ch).

Oxera

Oxera

Response to the consultation on private actions in competition law

Prepared for the Department for Business, Innovation & Skills

July 24th 2012

1 Introduction

Oxera is delighted to have been given the opportunity to respond to the BIS consultation on private actions in the UK competition regime.[1] Oxera is one of Europe's leading economic consultancies, with extensive practical experience as economic experts and advisers in competition regimes across the world. Oxera has been involved in a large number of Competition Act 1998 cases and damages actions before the Office of Fair Trading (OFT), the Competition Appeal Tribunal (CAT), the High Court, the Court of Appeal, and the Court of Session.

Oxera therefore considers itself well placed to contribute to this consultation. We do so mostly from an economic perspective; as such, we comment less on legal and procedural matters.

Promoting the use of private competition law actions before national courts in EU Member States has long been a policy goal of the European Commission.[2] Private actions—in particular, follow-on damages actions—are now common in several Member States. Yet the development of legal principles and procedural rules has been slow because, perhaps inevitably, the majority of cases are settled out of court. With limited relevant case law across Europe, national governments sometimes try to address this through specific legislative initiatives. This present consultation can be seen in this context.

[1] Department for Business, Innovation & Skills (2012), 'Private actions in competition law: A consultation on options for reform', April.

[2] See European Commission (2005), 'Green Paper: Damages Actions for the Breach of EC Antitrust Rules', COM(2005) 672 final, December; European Commission (2008), 'White Paper on Damages Actions for Breach of the EC Antitrust Rules', COM(2008) 165, April; European Commission (2011), 'Staff Working Document: Towards a Coherent European Approach to Collective Redress', February; and European Commission (2011), 'Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union', draft guidance paper, June.

The government's stated objective is to promote private actions as a complement to the UK's existing public enforcement regime. The consultation puts forward four main proposals:

– to make the CAT a 'major' venue for competition actions;

– to introduce a regime for opt-out collective actions for competition law, allowing consumers and businesses to bring cases collectively;

– to promote alternative dispute resolution (ADR) mechanisms to ensure that courts are the 'option of last resort';

– to ensure that private actions complement the public enforcement regime by protecting the incentives currently provided for companies to expose cartels.

In this response we focus on the first of these, and, in particular the proposed introduction of a rebuttable presumption on cartel overcharges that would be used in cases before the CAT (and other courts).

2 Making the CAT a 'major' venue for competition actions

The CAT was created under the Enterprise Act 2002 as a specialist tribunal dealing with competition law matters. However, there is some consensus that the CAT has, as described by BIS (para 4.14), a certain 'unfulfilled potential'. Although its main role has been to hear appeals against decisions made by the UK competition authorities and regulators under competition law and sector-specific regulations, the number of cases involving restrictive agreements or abuse of dominance (under the Competition Act 1998 or Articles 101 and 102 TFEU) has made up a relatively small proportion of its caseload. There are also restrictions on follow-on actions that the CAT can hear, in part due to some of its own rulings in the past. The government is now proposing to enhance the role of the CAT in three ways:

– by transferring more cases from the High Court to the CAT;

– by giving the CAT powers to hear cases directly (as opposed to dealing only with appeals or follow-on actions); and

– by allowing it to grant injunctions (ie, ordering anti-competitive behaviour to stop).

The main benefit of enhancing the role and powers of a specialist competition tribunal is likely to be that, over time, this will result in a body of clear and coherent case law developed by experienced expert judges. In the UK context, however, based on our experience, it appears that the generalist courts (the High Court of England and Wales and the Scottish Court of Session) have thus far been able to handle complex competition law cases. There have been many such actions in recent years—prominent examples include *BAGS v Amrac* (2008), a complex Article 101 case concerning the collective selling of horseracing broadcast rights, and *Purple Parking* (2011), an abuse of dominance case in which the High Court judge himself undertook the hypothetical monopolist test for market definition in the absence of an economic expert.[3]

While the current prevalence of competition law cases before the generalist courts in itself does not diminish the case for expanding the specialist role of the CAT (and moving not only cases but also judges from the High Court to the CAT), it does put into perspective the cost–

[3] Bookmakers Afternoon Greyhound Services Ltd & Ors v Amalgamated Racing Ltd & Ors [2008] EWHC 1978 (Ch) (8 August 2008); Purple Parking Limited and Meteor Parking Limited v Heathrow Airport Limited [2011] EWHC 987 (Ch) (15 April 2011). An example of a Scottish Court of Session ruling on an Article 101 case involving vertical restraints is *Calor Gas v Express Fuels and D Jamieson*, Court of Session [2008] CSOH 13.

benefit analysis undertaken by BIS for this particular measure. BIS states that it has 'initial evidence' that cases before the CAT are less costly and resolved more quickly than cases before the High Court, and as part of the consultation it is looking for more expert opinions on this.[4] Oxera's experience from working on both High Court and CAT cases does not suggest any obvious differences in terms of the cost or length of the proceedings between the two forums.

Allowing the CAT to hear stand-alone cases on restrictive agreements and abuse of dominance directly, in addition to appeals, would give it a dual role: in direct (stand-alone) cases it would be the decision-maker in disputes between claimants and defendants; while in appeal cases, dealing with the same substantive matters, it would review the decisions made previously by the competition authority. Will the CAT in practice treat appeal cases in the same way as stand-alone cases, with the OFT in effect being the claimant? Ultimately, this may again raise the question of whether the UK should have a prosecutorial system, where the competition authority must bring a case before the court rather than act as the decision-maker. Following BIS's consultation earlier this year on the institutional set-up of the UK competition regime, the government rejected the creation of a prosecutorial system, even though it saw many advantages of such a system and may reconsider it in future.[5]

3 Rebuttable presumptions

3.1 Presumptions in general

BIS acknowledges that 'it is intrinsically difficult to prove a breach of competition law due to the legal thresholds required, the complex economic factors that may underlie a case and the difficulties of obtaining the necessary information'.[6] This is the nature of competition law. As the CAT put it in 2005, 'competition law is not an area of law in which there is much scope for absolute concepts or sharp edges.'[7]

Yet this has not stopped competition law from evolving over the decades, or competition authorities and courts from developing workable criteria to assess anti-competitive conduct and mergers; nor have courts been deterred by the complexity of quantifying damages. One US court stated that: 'The antitrust cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor imperfections.'[8] As set out in the Oxera et al. (2009) report for the European Commission on quantifying damages, and reflected in the Commission's own draft guidance paper, a range of methods and models—from the simple to the more complex—can be used to estimate the harm arising from competition law infringements.[9] Courts across Europe are increasingly presented with such methods, and are familiarising themselves with them.

Where complexities arise in legal procedures, the use of rebuttable presumptions is a commonly accepted technique to make procedures more effective. These are presumptions

[4] Department for Business, Innovation & Skills (2012), 'Impact assessment—Private actions in competition law: A consultation on options for reform', April, pp. 18–19.

[5] Department for Business, Innovation & Skills (2012), 'Growth, competition and the competition regime: Government response to the consultation', March, p. 9.

[6] Department for Business, Innovation & Skills (2012), 'Private actions in competition law: A consultation on options for reform', April, para 4.8.

[7] Competition Appeal Tribunal, Judgment in Cases 1035/1/1/04 and 1041/2/1/04, *Racecourse Association and British Horseracing Board v OFT* [2005] CAT 29, August 2nd 2005, para 167.

[8] *South-East Coal Co. v. Consolidation Coal Co.,* 434 F.2d 767, 794 (6th Cir.1970).

[9] Oxera and a multi-jurisdictional team of lawyers led by Dr Assimakis Komninos (2009), 'Quantifying antitrust damages: towards non-binding guidance for courts', study prepared for the European Commission Directorate General for Competition, December; and European Commission (2011), 'Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union', draft guidance paper, June.

that a court holds to be true, unless someone comes forward to contest them and prove otherwise. From a policy perspective, rebuttable presumptions can enhance justice and the efficiency of the legal system, although they may not be appropriate in all circumstances.

3.2 The cartel overcharge presumption

The BIS consultation considers making follow-on cartel damages claims easier by introducing a rebuttable presumption on cartel overcharges:

> This would be likely to take the form of a presumption that a cartel had affected prices by a fixed amount, such as 20%—a figure which would be indicative of the amount that the current economic literature suggests prices can be raised by cartels. If no economic evidence was presented by either side, the damages award would be based on this assumption. The presumption would be rebuttable by either the claimant or defendant; however, to do so they would have to present the necessary evidence to do so. (para 4.40)

In support of this presumption, BIS notes that it places prospective claimants in a better position to estimate the likely benefits of bringing an action, and that it avoids the need to assemble extensive economic evidence, which BIS observes is 'costly, time-consuming, if it is possible at all' (para 4.41). Another point made by BIS is that the presumption shifts the burden of proof to the defendant and thus reduces the informational disadvantage of prospective claimants.[10]

Below we give several economic and policy reasons why a rebuttable presumption on cartel overcharges seems unwarranted, and then comment on the 20% presumption.[11]

First, BIS envisages the proposed presumption to apply to any breach of Article 101 TFEU (or the equivalent provision in Chapter 1 of the UK Competition Act 1998).[12] However, there are clear distinctions between different types of restrictive agreement caught under Article 101. First and foremost is the distinction between horizontal and vertical agreements—in the latter case an assumption of harm that is equivalent to a cartel overcharge does not make economic sense because such agreements can be pro-competitive and efficiency-enhancing. Moreover, some types of horizontal agreement are also benign or even pro-competitive (where they yield efficiency benefits). A presumption that an agreement has resulted in an overcharge seems suitable only in cases of classic 'hardcore' cartels, where the competition authority has found factual evidence of secret meetings during which competitors systematically agree to fix prices or allocate customers. The European Commission has uncovered many such hardcore cartels in the past ten years, but not all Article 101 infringements are of this nature.

Second, even in the case of hardcore cartels, where it seems more likely than not that prices have been raised illegally, it is questionable whether a rebuttable presumption on overcharge is needed. If there is clear factual evidence of price-fixing or market-sharing, a court is likely to be sympathetic to a claim that prices must have increased. Courts in Germany and other jurisdictions have followed this logic. For example, in a vitamins cartel case, the Dortmund Regional Court applied the prima facie rule that a market price was generally lower than a cartel price:

[10] One jurisdiction with an explicit rebuttable presumption of this nature is Hungary. The Hungarian Competition Act provides that injured parties bringing claims against members of price-fixing cartels can rely on the rebuttable presumption that 'it shall be deemed that the infringement affected the price by 10% unless the contrary is evidenced'. Competition Act (as amended, 2008), Hungary, Section 88/C; applicable to damages arising after September 2008.

[11] For a more detailed discussion of the incentive effects of the Hungarian rebuttable presumption, see Noble, R. and Pilsbury, S. (2008), 'Is 10 per cent the answer? The role of legal presumptions in private competition litigation', *Global Competition Litigation Review*, Issue 3, pp. 124–132.

[12] Department for Business, Innovation & Skills (2012), 'Private actions in competition law: A consultation on options for reform', footnote 38.

> The damage of a price cartel consists of the difference between the cartel price and the hypothetical competitive price in the absence of the cartel. According to the experience of life [Lebenserfahrung], it can be assumed that a competitive price is lower than a cartel price. The defendant did not show that it would have been different in this case and why. The difference between the competitive price and the cartel price represents a financial damage in the sense of lost wealth.[13]

British judges might be expected to follow a similar 'common sense' reasoning if the factual evidence is presented to them. A rebuttable presumption that a cartel has resulted in an overcharge greater than zero would not add anything. (Below we comment on the proposed 20% as the level of presumed overcharge.)

Third, based on our experience, we consider that the point made by BIS about the informational disadvantage of claimants is overstated. Claimants will often possess the relevant information on the purchases they made from the cartel, and on how any cartel overcharges may have been passed on to downstream prices. Moreover, the UK court rules provide for ample disclosure of information to parties on the other side of the dispute. Even if such information is not made available until later stages of the proceedings, the understanding that it will eventually have to be made available influences the dynamics of the litigation process. Furthermore, as noted in the Oxera et al. report for the Commission, several simple techniques can be used to approximate the order of magnitude of the likely cartel harm, even where relatively limited information is available.

3.3 The 20% rule

BIS seeks support for the 20% presumption by making references (in paras 4.40 and 4.43) to the economic literature, to the Oxera et al. study, and to the European Commission's draft guidance paper. According to BIS, 'the figure of 20% represents the lower end of the range that the current economic literature suggests prices can be raised by' (para 4.40). This is not correct, as shown below.

Economists have carried out many empirical studies on overcharges in past cartels, but some care is required when interpreting this empirical data. Not all studies on cartel overcharges would qualify as sufficiently robust. Empirical studies may also tend to focus on cartels that are most likely to have had an impact on the market, in which case many cartels with no effect will not have been captured in these studies (although, as shown below, a small but significant proportion of the cartels studied resulted in no overcharges). A study by Connor and Lande (2008) uses the most comprehensive dataset on cartel overcharges currently available, and is also the most widely cited study on this topic.[14] It contains 674 observations of average overcharges from 200 social science studies of cartels from the 18th century onwards—for example, it covers a British coal cartel that started in the 1770s and a Canadian petroleum lamp oil cartel in the 1870s. The authors find that the median cartel overcharge for all types of cartel was 20% of the cartel price.

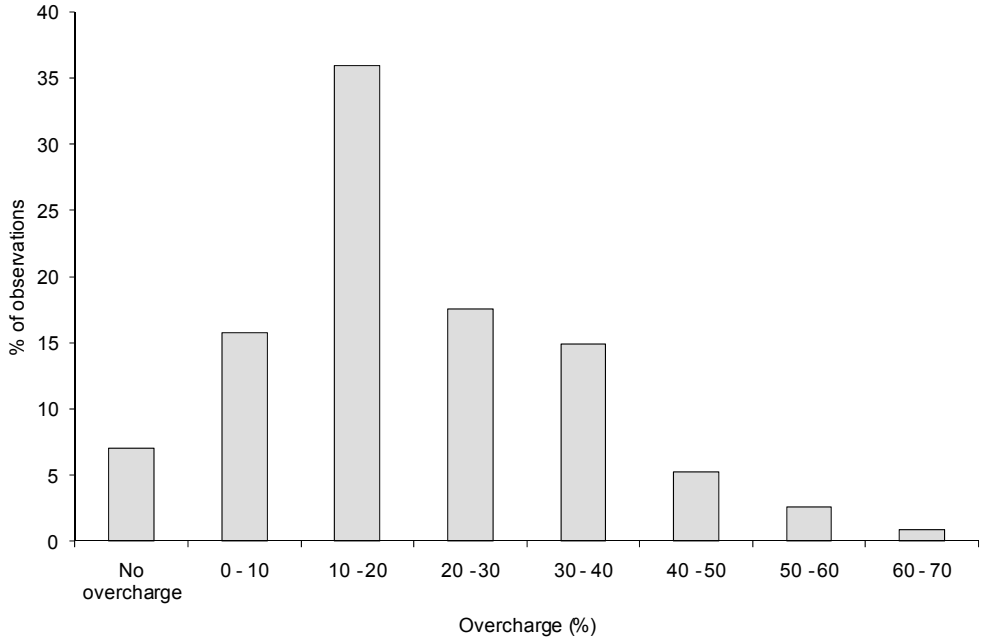
As part of the study for the European Commission referred to above, Oxera examined the dataset underlying the 2008 Connor and Lande study, as well as an additional 350 observations provided by Connor and Lande (thus amounting to more than 1,000 observations). We tested the sensitivity of the overcharge median and other results by limiting the sample to cartels that started after 1960 and to overcharge estimates obtained from peer-reviewed academic articles and chapters in published books (this reduced the sample size from over 1,000 to 114). Figure 1 illustrates the distribution of cartel overcharges across this new dataset of 114 observations. The range with the greatest number of

[13] LG Dortmund 0 55/ 02 Kart Vitaminkartell III, Decision, April 1st 2004. The quote is a translation by Oxera.

[14] Connor, J.M. and Lande, R.H. (2008), 'Cartel Overcharges and Optimal Cartel Fines', chapter 88, pp. 2203–18, in S.W. Waller (ed), *Issues in Competition Law and Policy*, volume 3, ABA Section of Antitrust Law.

observations is 10–20%. Oxera found that, in this dataset, the median overcharge is 18% of the cartel price—not far from the 20% found by Connor and Lande. The average overcharge is around 20%, compared with 23% in Connor and Lande. However, since the variation in observed overcharges is large, it is informative to consider the distribution of overcharges as well as the median or average overcharge. This shows that 20% is not at the 'lower end of the range', as BIS states.

Figure 3.1 Distribution of cartel overcharges in empirical studies of past cartels



Source: Oxera et al. (2009), based on underlying Connor and Lande data described above and selection criteria applied by Oxera.

Finally, when talking about cartel overcharges, it is important to be clear about what the percentage refers to. The current convention is to express the overcharge as a percentage of the actual cartel price—this is the convention that has been followed in Figure 3.1 and in the European Commission's draft guidance paper. Some academic studies express the overcharge as a percentage of the non-cartel price. BIS refers to the Oxera et al. and Commission documents, but also mentions prices being raised by 20%, which would imply the overcharge being 20% above the non-cartel price. To illustrate the difference, a cartel price of £125 represents a 25% increase above a non-cartel price of £100, but only a 20% overcharge based on the cartel price.

4 Concluding comments

Private actions face several obstacles, many of which are legal or procedural. Initiatives such as those proposed by BIS can contribute to removing such obstacles. If one country takes such steps, others may well follow, whether it is because they consider the UK initiatives to be good practice or because there is some rivalry to become the jurisdiction of choice for international follow-on actions.

One proposed measure that Oxera would advise against is the rebuttable presumption on cartel overcharges. The economic literature on past cartels provides some interesting background information on the orders of magnitude of overcharges. However, the literature provides no sound basis for a rebuttable presumption, because there is a wide variation in overcharges and there are certain types of horizontal and, more often, vertical agreements

that are not prima facie anti-competitive. In hardcore cartel cases where the competition authority has found factual evidence of price-fixing or the allocation of customers, courts are likely to be more sympathetic to overcharge claims, even without a rebuttable presumption. The amount of the overcharge in any particular damages case ultimately needs to be determined according to the facts of the case. The European Commission's draft guidance paper, having reviewed and discussed the overcharge literature, comes to the same cautious conclusion:

> These insights into the effects of cartels do not replace the quantification of the specific harm suffered by claimants in a particular case. However, national courts have, on the basis of such empirical knowledge, asserted that it is likely that cartels normally do lead to an overcharge and that the longer and more sustainable a cartel was, the more difficult it would be for a defendant to argue that no adverse impact on price did take place in a concrete case.[15]

If a rebuttable presumption on overcharge is nonetheless introduced, for the sake of balance rebuttable presumptions should also be considered for other stages in the damages estimation that pose practical difficulties—in particular, pass-on and volume effects. BIS considers but rejects a presumption on pass-on. Economic theory and empirical studies give some indication as to how these effects may arise and what possible orders of magnitude are involved.[16] However, as with cartel overcharges, case-by-case assessments are more appropriate and feasible in practice.

Oxera looks forward to BIS's progress in this consultation, and would be happy to help further through clarifications or follow-up discussions if needed.

[15] European Commission (2011), 'Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union', draft guidance paper, June, para 125.
[16] For a discussion, see Oxera et al. (2009), op. cit.

Pannone LLP

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

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

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

This response form can be returned to:

Tony Monblat
Consumer and Competition Policy
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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.

This response is from Pannone LLP, Solicitors of 123 Deansgate, Manchester M3 2BU.

In relation to competition compliance (non-contentious) we act for a wide range of clients in the public and private sectors, from large international groups to small SME's and for professional bodies. However in relation to potential private actions in competition law our clients are primarily SME's and so it is from the SME perspective that we are making this response to the BIS consultation.

As a general comment we very much welcome the objective of BIS to introduce measures to enable businesses, particularly SME's, to be better able to take direct action against anti-competitive behaviour.

We have not given detailed responses to every question raised in the Consultation as we have concentrated on those questions where there is a particular impact on SME's.

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?

We support this proposal.

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

We support this proposal

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

We support this proposal.

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

We welcome the principle of the proposed fast track route for SME's because of the difficulties under the current system of obtaining redress. By comparison to the current system the proposals would without doubt reduce the costs and risk exposure to an SME, particularly if the case is settled after the grant of an injunction.

We also agree that the regime must not create a disproportionate risk of vexatious or spurious claims or foster a compensation culture, and we support the emphasis on non-monetary resolutions and in particular the conduct complained of being stopped. Our experience corresponds with the findings of BIS's early discussions with claimant lawyers and business groups namely that the ability to challenge and stop the anti-competitive behaviour is a much higher priority for most SME's than redress in the form of damages, and they need the ability to do this promptly so the damage to their business is limited to as short a time as possible.

However, due to the complexity of competition cases, we consider that the fast track procedure will still deter SME's from taking direct action unless quite radical changes to procedure are adopted:

- Paragraph 4.31 states that the objective of the fast track procedure would be the swift grant of an injunction without the need in practice for many cases to proceed beyond this stage.

  From the perspective of the SME that would be ideal, but the best cases on which to seek an interim injunction are those where there is a clear prima facie case and little evidence is required. Unfortunately, due to their complexity, that will not often be the case with competition cases - it may

commonly be difficult for the judge to form a clear view at the interim stage. Whilst it may be readily demonstrated that damages would not be an adequate remedy, complex and usually costly economic analysis would be needed which may not be sufficiently emphatic to grant an interim injunction, particularly in cases where the competition authorities have not considered the market in question previously.

- On the proposals the SME's costs and management time of a competition case on the fast track procedure will remain high.

  We agree that a costs limit would make private competition law actions more accessible to SME's because it gives the SME certainty on maximum exposure for the other party's costs, which is of particular benefit where the opponent has deep pockets and is paying for a "Rolls Royce" service. However an SME's own costs will remain high if there is still the need for expert economists on every case and the same burden of proof on a claimant.

  Referring to Example 3, Box 2 (the hypothetical example of how the fast track might work in practice for the small mini bus company) the full trial lasts 4 days and includes 2 expert economists giving evidence. That is in addition to the time/cost of the preliminary trial when the interim injunction is applied for and the time/cost of the intervening legal/economic advice. These risks, costs and time would, in our view, mean that competition law redress would still not be readily accessible to SME's even under the fast track procedure.

  Contrary to the impression given in paragraph 4.29, it is not our experience that a preliminary letter (where there is a reasonable case backed by an informed legal opinion) will commonly resolve a stand-alone dispute because the infringer is not concerned about a threat of a complaint to the OFT. This is because it is likely to be outside the OFT's priorities and the risk of the SME initiating a court action are currently very low. For such a preliminary letter to open up genuine discussions the alleged infringer will need to consider that it is a real possibility that the SME can bring a private action using the fast track procedure.

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?

To overcome the above hurdles we consider that regard should be had to the radical simplification of the Patent County Court procedures when considering the design elements of the CAT fast track procedure.

- ***Remove need for allocation to fast track by Chairman***

  The BIS consultation proposes that the CAT chairman would decide whether to allocate the case to the fast track. This does not give the SME certainty that the fast track procedure is available to its case and without that certainty the SME may well be deterred from commencing an action.

  The Patents County Court does not have a similar requirement – any IP case can be brought and high value cases which are not appropriate to the streamlined Patents County Court procedure are effectively excluded by the £500,000 cap on damages. In our view if a cap on damages was adopted for the CAT fast track procedure and the need for allocation by the CAT Chairman removed this would give SME certainty that the fast track procedure is available to it, achieve the objective of non-monetary resolutions and have the effect of excluding cases which are not appropriate for the fast track procedure.

- ***In addition to cap on costs adopt simplified procedures so costs contained***

  To ensure that the SME's own costs and management time can be kept within acceptable limits procedures need to be adopted which are less than a full competition authority investigation to simplify the complexity of establishing the market definition and the breach of competition law.

Where a competition law infringement has already been established, as in a follow on case, this is a powerful tool to encourage the infringing party to open settlement discussions without any court action. To avoid court actions and reduce costs and complexity there needs to be a similar incentive for stand-alone cases.

If it becomes clear to an alleged infringer through an official route that there may be a reasonable case against them, the cost, risk and bad publicity of a competition case would generally be sufficient to encourage even a dominant player to be receptive to sensible discussions. It is in these situations that a letter to the alleged infringer from an official body that there is a reasonable case against it (as envisaged in paragraph 4.35) would substantially increase the likelihood of a resolution.

We recognise that the competition authorities have limited resources and so not all cases could first be fully investigated by the competition authorities. Paragraph 4.35 mentions that significant objections have been raised to the proposition that the OFT or the CAT write a warning letter to the alleged infringer that there is a reasonable case against them. However paragraph 4.35 appears not to completely rule out the warning letter proposition and we would urge the Government to consider further such a procedure which would ease the path for an SME seeking to establish a reasonable case against the alleged infringer without having to resort to a private action in the courts.

For example, a procedure akin to the mechanism via the UK patent office whereby for £200 a preliminary non-binding opinion will be given as to the merits of the case. We are aware that this procedure is not regarded as credible amongst IP professionals because it is not reliable and is seen as too superficial. However lessons could be learnt from that and a procedure introduced for competition cases with perhaps a higher fee, a slightly more detailed investigation and from a source which would be regarded as credible in the competition law community.

As with the Patents County Court, we consider that witness statements, expert reports, disclosure and cross-examination should be limited to that which the CAT determines is justified and necessary in the particular case

- ***Cross undertakings for damages to be waived on all fast track cases***

  We support the proposal that cross undertakings for damages be waived, and we consider that this waiver should apply in every case because cross undertakings (and the consequential application for security for costs) are an enormous deterrent to an SME seeking an injunction, however good its case.

  If the CAT to were to decide on a case by case basis whether or not to grant a waiver or limitation of cross undertakings for damages the lack of certainty for the SME as to whether or not the cross undertaking would be waived could still be a deterrent to starting an action. If the cross undertaking were not waived the SME may consider that it could not take that risk and so have to withdraw from the case resulting in a costs order against the SME.

In our view the risk of unmeritorious cases should not be a reason to not explore how SME's who have a reasonable case can be assisted further by the simplification of procedures and reduction in risks. Paragraph 4.29 points out that the experience of the Competition Pro Bono Service indicates that a significant number of SME's who consider they are victim of anti-competitive behaviour do not actually have a strong case. We have had the same experience in that many of the initial competition law preliminary queries are unfounded, but these are dealt with in a relatively short pro bono phone call without further action being necessary.

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

We support this proposal

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

We consider that this would assist.

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URN 12/742RF

Personal Support Unit

Dear Tony Monblat,

This is the Personal Support Unit's (PSU) formal response to the consultation conducted by the Department of Business, Innovation & Skills on Private actions in competition law - a consultation on options for reform

The PSU is a court-based charity which assists self-represented litigants with practical and emotional support. The PSU does not offer legal advice but does provide a team of trained, committed volunteers who are ready and willing to offer their time, skills and energy in resolving court-related matters. The PSU currently has seven offices across England and Wales.

Q1, 2, 9, 10, 11, 13, 14, 22
questions on whether and how to introduce collective actions

We support the proposal that collective actions be introduced for competition cases, because they will enable access to justice where individuals would otherwise have no or little ability to litigate against anti-competitive companies.

Private bodies, whether consumers or business should be allowed to bring stand-alone actions. The Competition Appeal Tribunal would be the appropriate venue. Opt-out actions should be permitted to enable the whole class of affected people to potentially benefit, and so the anti-competitive company can be ordered to pay damages for the full amount of their illegal behaviour.

Pro bono costs under Section 194 Legal Services Act 2007 should be extended to cover cases in the CAT.

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

This will ensure the defendant company has to compensate for the total harm from their anti-competitive acts. It will avoid the problems and uncertainty of finding a suitable destination in each case such as lobbying of judges. It will provide certainty of an independent destination to receive the funds in the public interest, in order to support further access to justice.

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

We are very supportive of unclaimed sums from collective actions being directed to the Access to Justice Foundation. We know them well and have first hand evidence of how they work . In our view the Access to Justice Foundation would be the most appropriate recipient, as it will distribute the funds to organisations and projects that provide free legal help to those in need. This will support the ultimate aim of collective actions which is to enable access to justice. The Foundation will receive funds on behalf of the whole advice and

pro bono sector, whose ability to provide help to the public is being endangered by the legal aid and local authority cuts. The Foundation is already the recipient of pro bono costs and therefore has experience of receiving and distributing funds from litigation.

Q1, 2, 9, 10, 11, 13, 14, 22
[Various questions on whether and how to introduce collective actions]

We support the proposal that collective actions be introduced for competition cases, because they will enable access to justice where individuals would otherwise have no or little ability to litigate against anti-competitive companies.

Private bodies, whether consumers or business should be allowed to bring stand-alone actions. The Competition Appeal Tribunal would be the appropriate venue. Opt-out actions should be permitted to enable the whole class of affected people to potentially benefit, and so the anti-competitive company can be ordered to pay damages for the full amount of their illegal behaviour.

Pro bono costs under Section 194 Legal Services Act 2007 should be extended to cover cases in the CAT.

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

We believe that unclaimed sums from collective actions should be directed to a single named body. This will ensure the defendant company has to compensate for the total harm from their anti-competitive acts. It will avoid the problems and uncertainty of finding a suitable destination in each case such as lobbying of judges. It will provide certainty of an independent destination to receive the funds in the public interest, in order to support further access to justice.

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The Foundation will receive funds on behalf of the whole advice and pro bono sector, whose ability to provide help to the public is being endangered by the legal aid and local authority cuts.

The Foundation is already the recipient of pro bono costs and therefore has experience of receiving and distributing funds from litigation.

Yours sincerely

Judith March

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Peter Whelan (University of East Anglia)

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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 X
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

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N/A

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

N/A

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

N/A

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

N/A

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?

N/A

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?

N/A

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?

Considerable legal issues remain to be resolved concerning private enforcement of competition law in the United Kingdom. One of these issues is the exact status of the passing-on defence (i.e., the defence that allows an infringer to escape liability in a damages action by a given purchaser to the extent of any pass-on by that purchaser). The lack of certainty concerning the status of this defence acts as an obstacle to the initiation of private actions. This problem should be overcome by the express acknowledgment of the passing-on defence in legislation.

The passing-on defence can be rationalised as follows. First, it is arguable that under EU law the indirect purchaser has the right to sue for damages if she has suffered due to a violation of Article 101 or 102 TFEU. In *Manfredi* [Joined Cases C-295/04 to C-298/04, [2006] ECR I-6619], for example, the Court of Justice held at [61] ‘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 101 or 102 TFEU]' (emphasis added). Incidentally, if this is so, then S 60 of the Competition Act 1998 would also require indirect purchaser standing when private litigants pursue damages for the violation of the Chapter I or II prohibitions. Second, if indirect purchaser standing is indeed granted, then in order to ensure consistency with the objective of just compensation one is required to acknowledge the existence of the passing-on defence. This is so as the non-recognition of the defence unjustly enriches the direct purchaser, who can consequently receive damages for a loss she has not in fact suffered. By contrast, the acknowledgement of the defence in this context ensures that damages will only be paid where the loss is actually suffered.

Additional advantages of the recognition of the defence can also be identified. For example, in the case of a follow-on action, the existence of the passing-on defence helps to reduce the scope for violation of the principle of *ne bis in idem* (double jeopardy). This is so as the passing-on defence avoids the imposition of damages above the level required for compensation to be achieved. In other words, it avoids the imposition of what can be conceptualised as punitive damages. In *Devenish* [[2007] EWHC 2394 (Ch)] it was held that the imposition of punitive damages in a follow-on action would result in a violation of *ne bis idem* if a fine was initially imposed for the competition violation by the relevant competition authority. (It would also violate Article 16 of Regulation 1/2003, if the underlying enforcement decision was adopted by the EU Commission).

The arguments against recognition are not very persuasive. Above all, it is feared that the courts are not well equipped to deal with the passing-on defence and the economic assessments that will inevitably have to be carried out as a result of its recognition. However, courts are regularly called upon to carry out complex economic evaluations in tort cases. In other areas of law where the passing-on defence is recognised, such as that relating to taxation, the judiciary have not expressed misgivings about the added complexities engendered. Furthermore, following the adoption of Regulation 1/2003, when enforcing the EU competition law rules, national courts are expected to be able to cope with the demands placed on them by Article 101(3) TFEU, a provision of EU law that requires one to conduct complex economic assessments. Advocates of non-recognition should have a little bit more faith in the judiciary of this particular jurisdiction.

None of this is to say, however, that there are no difficulties with the use of the passing-on defence. In particular, its existence may have an impact on the incentives of injured purchasers (who have passed-on some of their injury) to sue: the reduced size of the potential prize, coupled with the transactions costs and risks associated with litigation, could tip the balance in favour of non-action by the injured party. Such a problem can be addressed by the use of other mechanisms to incentivise injured parties to sue. By making certain choices regarding, e.g., collective actions, representative actions, legal presumptions concerning the size of the overcharge, cost rules etc., the legislature can increase the incentives facing the purchaser who has been injured. Measures designed to encourage and support private enforcement should of course be understood as a package: these measures are interlinked and cannot be analysed in isolation. The point here is that: (a) the passing-on defence must be recognised if the indirect purchaser can sue and the principle of fair compensation is to be operationalised; and (b) other mechanisms exist to readdress any imbalance in incentives occasioned by the recognition of the passing-on defence.

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.

N/A

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.

N/A

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

N/A

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

N/A

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

N/A

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

N/A

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

N/A

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

N/A

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

N/A

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?

N/A

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

N/A

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.

N/A

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?

N/A

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?

N/A

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?

N/A

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

N/A

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?

N/A

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

N/A

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

N/A

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

N/A

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?

N/A

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?

N/A

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

N/A

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?

N/A

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?

N/A

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

N/A

Q. 35 Do you have any other comments that might aid the consultation process as a whole?
Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

N/A

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Public Law Project

Public Law Project Re
Department of Busine
Skills consultation on
Competition Law

Introduction

The Public Law Project (PLP) is an independent national legal charity, set up in 1990 with the key aim of improving access to justice for the disadvantaged. We discharge our charitable objectives through four distinct strands of work; casework, policy, research, and training.

Summary

PLP's expertise is in matters of public law (which is concerned with the legal relationships between individuals and the state). We do not have any expertise in matters of private law or of competition law. Accordingly we do not consider it appropriate to express a view on the majority of questions raised in this consultation.

However, given our clear organisational interest in access to justice, we do consider it appropriate to respond to your question about the most appropriate single recipient for unclaimed funds further to collective actions in which a company has been found to have acted unlawfully and has been ordered to pay damages to affected individuals.

Consultation Questions

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?

If unclaimed sums arising in this context were to be paid to a single specified body PLP would support the proposal that the Access to Justice Foundation would be the most appropriate recipient. We make the following observations:

- The purpose at the heart of collective actions is to enable all individuals affected by a wrong to achieve justice. Accordingly we consider there are sound policy reasons to support the use of unclaimed damages (all reasonable efforts to locate entitled individuals having failed) to further access to justice for the public more generally.

- The charitable/voluntary advice sector has 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.

- 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.

- 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 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.

- We are not aware of a more obviously suitable single recipient organisation.

Public Law Project

July 2012

Rachael Mulheron (Queen Mary University of London), Vincent Smith (Sheppard & Smith)

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

A response from:

Prof. Rachael Mulheron
Department of Law, Queen Mary University of London

and

Vincent Smith
Sheppard & Smith, and Visiting Fellow, British Institute of International & Comparative Law

Dated 8 July 2012

Summary position

We strongly welcome the Government's consultation on reform of the regime for private actions in competition law in the UK, '*Private Actions in Competition Law: A Consultation on Options for Reform*' ('the Consultation'). We believe that the proposed changes will be in the interests, in particular, of consumers and law-abiding small businesses, and we encourage the Government to introduce legislation to permit the implementation of these changes as soon as Parliamentary time allows. Our views on the questions put in the consultation document are given below.

About the respondents

Rachael Mulheron is Professor of Law at the Department of Law, Queen Mary University of London, where she has taught since 2004. Her principal fields of academic research concern Class Actions jurisprudence and Tort law. Rachael has advised a number of law reform commissions, NGO's, and law firms, on collective redress-related matters, and publishes regularly in the area. In 2009, she was appointed as a member of the Civil Justice Council of England and Wales (CJC). Prior to her academic career, Rachael practised as a litigation solicitor in Brisbane, Australia.

Whilst Rachael is a member of the CJC, it should be emphasised that this response in written in her personal academic capacity, and the views expressed herein should not necessarily be taken to represent the views of the Council. Relevantly for this Response, it should be clarified that Rachael was author of the report, *Competition Law Cases under the Opt-Out Regimes of Australia, Canada*

and Portugal (A Research Paper for BERR, October 2008); was a contributor on the Working Group which (under the chairmanship of Robin Knowles QC) was tasked with preparing *Draft Court Rules for Collective Proceedings* (published 2 February 2010), in anticipation of the opt-out regime contained in the Financial Services Bill 2010 coming into force; and was a contributing author to the earlier Civil Justice Council's report, *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions: Final Report* (November 2008).

Vincent Smith is a partner at Sheppard & Smith and a visiting Fellow at the British Institute of international and Comparative Law. He was, until mid 2010, a founding partner at Hausfeld & Co LLP in London focussing on UK and European claimant and complainant competition matters.

He joined from the Office of Fair Trading, the UK's main public competition enforcement body, where he was Senior Director for Competition and Director of its Competition Enforcement division from 2003–7. He led the OFT's competition function, having overall responsibility for the OFT's work in combatting cartels and other anti-competitive practices, and also for the OFT's 'first phase' merger control duties, as well as oversight of its developing enforcement policy—for example on case prioritisation and private enforcement. From 2002–3, he was the OFT's Director of Competition Policy Co-ordination and deputy Director of the division.

Vincent qualified as a Solicitor (England and Wales) in 1990 and spent ten years in private practice in London and Brussels before joining the Civil Service, specialising in EC and competition law. He is a regular speaker at conferences and seminars and teaches competition law and procedure at postgraduate level at City University, London, and has also taught postgraduates in the law faculty at University College, London.

THE ROLE OF THE COMPETITION APPEAL TRIBUNAL (CAT)

Q1. Should section 16 of the Enterprise Act be amended to enable the courts to transfer competition cases to the Competition Appeal Tribunal ('CAT')?

We agree with the Government's initial conclusion (at [4.16]–[4.18]) that regulations should be enacted under s 16(1) of the Enterprise Act 2002, c 40, to allow both the courts and the CAT greater flexibility in managing what the Consultation itself describes as 'complex litigation'. It is not immediately apparent that s 16 requires amendment, however—or, at least, not beyond consequential amendments, to allow all kinds of competition cases (including stand-alone cases) to be transferred to the CAT.

We note that, in light of any amendments to s 16, Practice Direction #30 of the Civil Procedure Rules 1998 (SI 1998/3132), will also need to be amended. The current version of PD30 reads, in part:

> ***Transfer from the High Court or a county court to the Competition Appeal Tribunal under section 16(4) of the Enterprise Act 2002***
>
> *8.3 The High Court or a county court may pursuant to section 16(4) of the 2002 Act, on its own initiative or on application by the claimant or defendant, order the transfer of any part of the proceedings before it, which relates to a claim to which section 47A of the 1998 Act applies, to the CAT.*
>
> *8.4 When considering whether to make an order under paragraph 8.3 the court shall take into account whether –*
> *(1)there is a similar claim under section 47A of the 1998 Act based on the same infringement currently before the CAT;*
> *(2)the CAT has previously made a decision on a similar claim under section 47A of the 1998 Act based on the same infringement; or*
> *(3)the CAT has developed considerable expertise by previously dealing with a significant number of cases arising from the same or similar infringements.*

Additionally, newly-drafted rules of court will presumably set out the procedures associated with a transfer of a competition case to the CAT, as envisaged by s 16(3) of the Enterprise Act.

Furthermore, we suggest that the current rules, which require claims which are mainly competition-based, to be commenced in the Chancery (or Commercial)divisions of the High Court in London, be retained. (We refer, in particular, to *Practice Direction–Competition Law–Claims*

Relating to the Application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998, [2.1]). The judges in those divisions—who presumably will remain as chairmen of the CAT, as now—can themselves continue to hear transferred cases if they believe that to be appropriate. This would, we suggest, considerably assist in managing cases which are transferred, where the preponderance of the claim is a competition-based one, but where there are important *subsidiary* issues which have wider legal effects. We suggest this flexibility would be of assistance, for example, in dealing with important competition law points arising in Intellectual Property litigation and similar areas of law, where competition questions regularly arise.

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

We believe that the Government is correct to think that one of the main reasons for the lack of use of the CAT for redress actions is the narrowness of its current jurisdiction. We strongly support the proposal to allow the CAT to hear all kinds of competition actions—whether they be stand-alone actions, follow-on actions under s 47A, follow-on actions under s 47B, representative actions, group litigation orders, or unitary actions—as well as appeals against decisions of UK competition and regulatory authorities.

In that regard, we concur with the sentiments of the Chairman of the Competition Appeal Tribunal, Sir Gerald Barling QC, who has written, extra-curially ('Collective Redress for Breach of Competition Law—A Case for Reform?' [2011] *Competition LJ* 5, 7), that:

> [t]he inability of claimants to commence 'stand-alone' claims for damages in the CAT (i.e., claims for damages brought where there is no pre-existing infringement finding) deprives litigants of the choice of having their claim for damages, including the liability (i.e., infringement) element, determined in the specialist tribunal, where they consider it to be the appropriate forum for their case. This is perverse, given that ... the specialist tribunal is able to determine the identical issue of liability in the context of an appeal from a decision of the authority.

In the same article, a reference is made to the decision of Jacobs LJ in *Enron Coal Services Ltd (in liq) v English Welsh & Scottish Railway Ltd* [2011] EWCA Civ 2, with which we entirely agree. Indeed, the *whole* of the relevant comments of Jacobs LJ are worth noting in this regard (at [143]):

> It seems somewhat anomalous that the specialist tribunal is entrusted with the decision as to infringement or not, on an appeal from a regulator, but is not allowed to touch that question in a claim for damages. As the first appeal in these proceedings showed, that can have a significant limiting effect on the scope of proceedings under section 47A. No doubt there are policy issues to be considered here,

but it seems to me that the interrelationship between the jurisdiction of the court and that of the Tribunal in relation to claims for damages may merit reassessment, in the light of experience to date in the use of one type of claim and of the other.

Additionally, we believe that to statutorily widen the CAT's jurisdiction will mitigate the unfortunate effects of the Court of Appeal's decision in *Enron Coal Services*, supra, which strictly limits the jurisdiction of the CAT to issues which are squarely within the scope of the decision on which the action is based.

We do, however, have three comments on the proposals in the Consultation:

- any legislative amendment will need to state **clearly** what is meant by a competition law 'stand-alone claim'. We assume that the Government intends for that term to cover claims for damages or for injunctive relief (subject to Q3 below) *which are based on breach of EU and/or UK competition laws*, and which claims are available in tort as a breach of statutory duty. However, we suggest that, although clearly the CAT will need to focus on competition cases, there may be claims which disclose incidental issues which are not pleaded as breaches of the relevant statutory duties. In these types of cases, the CAT should nevertheless have a discretion to assume jurisdiction over those claims directly, rather than requiring the claimants to go through the process of issuing in the High Court and then requesting a judge to transfer the case to the CAT;

- we note that the Government is considering making the CAT a Superior Court of Record (notably in connection with the proposed power to allow the CAT to grant injunctions, per [4.23] of the Consultation). We suggest that this may **not** be a helpful step, given the more stringent procedural, recording and publishing requirements that apply to such courts. CAT was set up to provide a flexible jurisdiction to hear competition cases of all sizes, and to be able to offer a 'light touch' alternative to the Senior Courts, in this complex area of the law;

- however, we agree that appeals from decisions of the CAT should continue to be permitted on a *point of law* only (or, in cases involving penalties, as to amount of the penalty) to the Court of Appeal. This could presumably be achieved by amending the current statutory provisions(in the Competition Act 1998, s 49; and in the Enterprise Act 2002, ss 120, 179) to cover appeals from stand-alone actions.

Q3. Should the CAT be allowed to grant injunctions?

We strongly support the proposal to allow the CAT to grant injunctions. For victims of alleged abuses of a dominant position, in particular, injunctive relief is at least as important as damages—and, in practice, may become **more** important, if access to the CAT makes this type of relief easier to obtain.

We would not, however, be in favour of achieving this policy aim by making the CAT a Superior Court of Record, given that (as discussed in Q2 above) this change may deprive the CAT of the flexibility it needs to deal fairly with all types and sizes of cases.

Instead, we would favour a separate statutory power allowing the CAT to grant injunctions as if it were the High Court, but on such terms (particularly as to any cross-undertaking as to damages) as it considers fair.

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

We believe that a better (and more economical) route to resolving competition problems is indispensable in assisting SMEs to resolve their competition disputes, and endorse the idea of a fast track model for that purpose. In addition to the multi-sourced evidence that SMEs are finding it difficult to obtain 'genuinely accessible recourse to the courts for anticompetitive behaviour' (per [4.25] of the Consultation), the reality is that public competition authorities (whether in the UK or the EC) are unable to 'take on board' all of the meritorious cases which may require resolution. This situation is unlikely to improve substantially in the short-to-medium term given necessary public sector resource constraints.

Furthermore, we agree, in general, with the four-stage process of the fast track model proposed at [4.30]–[4.31] of the Consultation.

However, we consider that, in appropriate (albeit exceptional) cases, the fast track route ought to be made available to *individual litigants* too (and not only SMEs), where their business and/or consumer interests are being substantially threatened by allegedly anticompetitive behaviour. The same considerations that apply to SMEs (vulnerability, high costs associated with litigation, a lack of assistance provided by regulators in bringing the anticompetitive conduct to an end) may apply, to an even greater degree, to individual litigants. Hence, we do not consider that this type of litigant should

be automatically precluded from the fast track route, although consideration should be given to using the proposed class action regime instead where a number of similar 'small claims' are likely to be brought within a short time period.

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

We agree with the 'on the papers' resolution, with speedy hearing within six months, and with curtailed hearing time, as outlined in [4.31] of the Consultation. Dealing with each of the other design elements in turn:

Costs: We agree that costs-capping is essential for SMEs in a 'fast track' procedure, and that the £25,000 limit proposed in the Consultation is a sensible one for cases claiming damages for anti-competitive agreements. This observation is subject to three caveats:

- first, we suggest that a somewhat higher limit might be appropriate in *abuse of market dominance* cases, given that this type of case may—even in the fast track—require the use of an economist to define a relevant market (at least), whose fees would need to be taken into account;

- secondly, we suggest that, following the practice of the Patents County Court fast track (as set out in [4.27] of the Consultation), a higher limit of up to £50,000 would be appropriate in *some* cases involving SMEs and large damages claims; and

- thirdly, for individual consumer claims, we suggest that an even greater degree of simplification might be useful, in order to encourage those with well-founded claims to come forward—**either** that there should be no order on costs (so that both sides always paid their own costs); **or** that any adverse costs order would be capped to the amount the claimant claimed in damages. We suggest that, absent these design measures, consumers with meritorious individual claims might be discouraged, by a potential costs liability of up to £25,000, from bringing (for them) quite significant claims (say, in the £10,000 region).

Damages: Rather than set an absolute limit on the amount of damages which can be claimed in the 'fast track' procedure (per the suggestion made in the Consultation at [4.33]), we suggest that the jurisdictional focus should be on *the kind of claimant*. In particular, any claim for damages (and/or injunction) brought by an SME, or by an individual consumer, should be automatically allocated to

the fast track, unless there are good reasons for it to be heard by the CAT following its usual procedures. This would enable SMEs and consumers to access the CAT more easily. Commencing proceedings, by means of a simplified web-based application (per [4.30]) appears to us to be a good innovation. It is important that any explanatory web page should have a clear expectation as to how the case would be dealt with on a fast track basis.

Notwithstanding our comments in the previous paragraph, if a cap on fast track damages is thought to be desirable, we suggest that **£25,000** in damages per claimant may be appropriate. Claims above this limit are large enough to be within the jurisdiction of the High Court which, we suggest, is a good indicator that they are no longer of a kind suitable for fast track treatment.

Injunctive relief: As mentioned above, we agree that the availability of injunctive relief is likely to be the most important **first** form of redress sought, and the most appropriate for the CAT to grant on an interim basis, before the claim has been fully set out. We believe, however, that it will be important for the CAT to have a wide discretion as to the terms upon which any injunction is granted. In particular, it will be important to avoid SMEs being dissuaded from applying for injunctions due to a fear of the consequences of an onerous and automatic cross-undertaking in damages.

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

We suggest that—as an exception to the general principle that attempting ADR should be voluntary—there ought to be a requirement that any case assigned to the fast track should be the subject of an attempt to resolve it by mediation, with both parties being required to attempt to resolve the dispute in good faith.

It may be sensible, if this suggestion is adopted, for the mediator to be a member of the CAT (we feel sure that CAT members would be more than willing to undertake training for this purpose). This would ensure that: (1) the mediation could be informed by the expertise of CAT members, and (2) perhaps more importantly, any refusal to engage seriously with the mediation could be the subject of a sanction by the full Tribunal, on the recommendation of the mediator member.

We further suggest that:

- if the matter is resolved through mediation, there should be no costs award against either party;

- if the matter cannot be resolved through mediation, despite the *good* faith efforts of the parties, then the matter should continue on the fast track, with the issues raised in the mediation kept confidential;

- if the matter cannot be resolved through mediation, due to the *bad* faith behaviour of one of the parties, the mediator should have the ability to recommend a costs sanction, payable in any event, against that party, should the claim proceed.

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

Presumptions of loss can be helpful in encouraging claimants to bring an action to recover the overcharge caused to them by a cartel, and in general, we would support the introduction of such a presumption into any governing legislation. However, the design of such a presumption will be critical in ensuring that it encourages well-founded claims, while not encouraging speculative or vexatious litigation.

Two issues in particular need to be considered with some care: (1) which claimants should be able to benefit from the presumption; and (2) how great should the presumed loss be? Dealing with each in turn:

Type of claimant: On the basis that both direct and indirect purchasers from a cartel may have a meritorious claim against the cartelists for breach of the duties contained in the Competition Act 1998, we believe that the Government should consider whether the presumption of loss needs to be available to all potential cartel claimants, or only to some of them.

We suggest that, in order to promote the policy aim of increasing the use of private actions to foster a competition culture, it may be appropriate to limit the availability of the presumption to **direct** purchasers claiming from a cartel. We further suggest that any legislation should expressly provide that the presumption of loss available to direct purchasers does not affect the right of indirect purchasers to recover damages for losses caused to them, where such losses can be proven. Our two suggestions are based upon the following pillars of reasoning.

First, the presumption of loss which is available to direct purchasers would, in particular, make it easier for those in the best position to have access to the relevant evidence to bring a claim—

most importantly in 'stand-alone' actions, where there is no prior cartel finding by a competition authority upon which the claimants can rely.

Secondly, we believe that the presumption of loss should **not** be available to the class of indirect purchasers. This class can give rise to significant problems of causation and of quantification of the loss actually suffered further down the value chain, and further removed from the initial overcharge. The presumption is made all the more difficult to justify if the supply chain is long; if the widgets are incorporated into other products as they pass down the supply chain and are then sold as a different product X and if the price of product X is determined by external market circumstances which are largely divorced from the overcharge. In any event, we suggest that a presumption available to all claimants, whether direct or indirect, may well lead to excessive (overlapping) awards of damages, as cartelists will not normally be in a position to rebut the presumption for indirect claims lower down the distribution chain than they are accustomed to trade with.

We note here the policy reasons advanced by the US Supreme Court in *Illinois Brick Co v Illinois*, 431 US 720 (1977). This was an anti-trust treble damages action brought by indirect purchasers of structures built using concrete blocks, in which it was alleged that the manufacturers of the concrete blocks had engaged in a conspiracy to fix prices in violation of the Sherman Act. The question was whether indirect purchasers (homeowners and others) (as opposed to the class of direct purchasers) could recover the alleged overcharge. It was held by the US Supreme Court that the class of indirect purchasers could not sue for treble damages for price-fixing, because allowing claims by both direct and indirect purchasers would create the risk of double recovery against the cartellist; and it would make the process of determining who had suffered what proportion of the price overcharge too complex, thereby undermining the effectiveness of the remedy. Hence, standing to sue under federal US anti-trust laws was limited to the class of direct purchasers.

Thirdly, in implementing a presumption of loss for the class of direct purchasers, we do not believe that it would either unfairly enrich the direct claimants, or exclude indirect claimants from compensation. As a presumption, it would be capable of being rebutted. And, assuming an effectively competitive market as between the direct purchasers and indirect purchasers, the compensation recovered should be passed on in lower competitive prices by the direct purchasers to their customers.

Finally, if the Government wishes to introduce a presumption limited to certain types of claimant, we suggest that it might be appropriate to limit the presumption to damages claims brought by consumers or SMEs in the proposed 'fast track' (as discussed further below).

Quantum of loss: We believe that the Government *should* set an initial figure for the presumptive loss, but reserve to itself the power to amend the figure in the light of experience and where empirical economic work may suggest that a different level is preferable.

The amount suggested in the consultation document—20% of the value of purchases—appears to us to be at the *maximum* end of the range that it would be sensible to provide. On the basis that direct purchasers alone would be able to benefit from the presumption(so that indirect purchaser claims would still be possible); and having regard to the practice in other jurisdictions which have introduced such a presumption (e.g., s 88/C of the 2009 Hungarian Competition Act, which 'deem[s] that the infringement affected the price by 10 % unless the contrary is evidenced'), a level of **10%** would seem to us to be more appropriate. We also note that, in its *Guidelines Manual* for 2011 (published 1 November 2011), the US Sentencing Commission continues to adhere to the view that, '[i]t is estimated that the average gain from price-fixing is 10% of the selling price' (at pp 311–12).

Q8. Is there a case for directly addressing the passing-on defence in legislation? If so, what outcome is desired and how, precisely, should this best be done?

We note that, despite the centrality of this question to competition damages claims, there is still no direct precedent, either from courts in the UK or from the Court of Justice of the European Union, which confirms the existence or extent of a passing-on principle (unlike in the United States, in which the possibility of a defendant pleading the passing-on defence has been rejected in *Hanover Shoe Ltd Inc v United Shoe Machine Corp*, 392 US 481, 88 S Ct 2224 (1968)).

Hence, to implement legislation against this background of judicial hesitancy in the domestic and European contexts, whatever the policy driver(s), is likely to be difficult.

Moreover, it is not obvious to us as to what that policy outcome should be: there appear to be two (probably opposing) alternatives.

On the one hand is the position adopted by the German law (7th Amendment of the German Act Against Restraints on Competition (*GesetzgegenWettbewerbsbeschränkungen – GWB*, s 33(3), which entered into force on 1 July 2005), which provides for a presumption of no passing-on of loss from the direct purchasers to the indirect purchasers, by virtue of the following:

> If a good or a service was purchased at an inflated price, the existence of damage is not precluded because the good or the service was resold.

This was enacted presumably in order to encourage more damages actions by direct purchasers, and thus to enhance the overall effect of competition enforcement (see, e.g., the discussion in: W Wurmnest, 'A New Era for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law against Restraints of Competition' (2005) 6 *German Law Journal* 1173, 1182–84).

On the other hand is the position adopted by the European Commission in its consultation, *White Paper on Damages Actions for Breach of the EC Antitrust Rules* (2008), which provided for a rebuttable presumption of passing-on for the entire loss to the end-consumer (per [2.6]):

> Purchasers at, or near the end of the distribution chain are often those most harmed by antitrust infringements, but given their distance from the infringement they find it particularly difficult to produce sufficient proof of the existence and extent of passing-on of the illegal overcharge along the distribution chain. If such claimants are unable to produce this proof, they will not be compensated and the infringer, who may have successfully used the passing-on defence against another claimants upstream, would retain an unjust enrichment. To avoid such scenario, the Commission therefore proposes to lighten the victim's burden and suggests that: indirect purchasers should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety.

This appears to have been motivated partly by economic theory which suggests that, in the (very) long term, all overcharges will be passed through to the final consumer, and secondly, by a policy desire to encourage consumer claims in competition cases.

Hence, absent relevant jurisprudence in the UK and in the EU, and absent a single view of the policy to be pursued by legislation on the passing-on issue, we tend to agree with the position in the Consultation that legislation is probably premature, and may ultimately turn out to be unnecessary.

However, we do suggest that any legislation should provide for a power for the Government to legislate by statutory instrument in this area, if national laws developed in a way that hindered the effective enforcement of their rights by damaged private parties.

COLLECTIVE ACTIONS

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

We consider that the current collective redress mechanisms in the UK to obtain compensatory redress for competition law infringements (either alleged or proven), are wholly inadequate as they stand. A number of the reasons for that have already been canvassed in the Consultation. Our view is that the landscape is bleak for consumers and SMEs who have competition law grievances, and we base that view upon a combination of the following factors:

- The unsuccessful attempt by the victims (mainly SMEs) of the air cargo cartel to use the English representative rule, in *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284, when that particular cartel has been the subject of litigation, without such procedural hazards, elsewhere in major common law countries (Canada, United States, and Australia);

- The representative statutory action available under s 47B of the Competition Act 1998 has been of notably limited utility, as the Consultation itself acknowledges in its discussion of the 'football shirts' case brought by Which? against JJB Sports plc (at [5.4]). That fact was also explicitly acknowledged in *Enron Coal Services Ltd (in liq) v English Welsh & Scottish Railway Ltd* [2011] EWCA Civ 2, in which Jacobs LJ noted that 'this jurisdiction seems likely to be of little use in practice, after the very limited success of the one claim brought so far', at [142];

- OFT-imposed fines have not lead to many subsequent follow-on private actions – or at least not in the public domain - for compensation, under s 47A of the Competition Act 1998, either;

- Not one Group Litigation Order has been ordered for a competition law infringement, despite that regime's availability since May 2000 at about the same time that the relevant provisions of the Competition Act 1998 came into force (March 2000);

- The way in which the English class obtained redress in the trans-Atlantic fuel surcharge cartel involving air passengers was to join the US federal class action (via a settlement reached in a

federal court of the Northern District of California, on 25 April 2008), albeit that that 'add-on' class was formed on an opt-in basis, not as an opt-out class;

- The extra-curial comments of the Chairman of the Competition Appeal Tribunal, Sir Gerald Barling QC, are extremely important in highlighting the gaps which have become evident in competition law redress, (see 'Collective Redress for Breach of Competition Law—A Case for Reform?' [2011] *Competition LJ* 5, 7), and in which, for six stipulated reasons given in that article, the Chairman emphatically states that, '[i]n my view, there are a number of benefits that may flow from introducing an opt-out regime, at least in the UK. ... there would be a benefit in making available a genuine opt-out claim, to be used only where the court certifies it to be appropriate, and progressed under judicial supervision. The main gain would be the removal of the often significant hurdle of enticing a sufficient number of consumers to sign up to a claim where its financial value to each claimant is relatively small, but where the collective loss is enormous' (at pp 19–20);

- Empirical research has shown significant gaps in redress for consumers and SMEs in the competition law sector. In a report prepared by one of the authors of this Response in 2008, relevant to 'evidence of need' for better compensatory redress in the jurisdiction of England and Wales, some English claimant lawyers who responded to the empirical study identified actions which raised possible competition law infringements, but which, for cost-benefit reasons, they were unwilling to bring on behalf of the relevant claimant, under a GLO or via any other means (Mulheron, *Reform of Collective Redress in England and Wales: A Perspective of Need* (Feb 2008) pp 64–65). Additionally, Deloitte v Touche LLP's, *Deterrent Effect of Competition Enforcement by the OFT* (Nov 2007) showed a marked reluctance and unwillingness on the part of SMEs to use court procedures for alleged competition law grievances;

- At a stakeholder workshop organised by the office of Edward Davey, Minister for Employment Relations, Consumer and Postal Affairs, on private enforcement of competition law grievances, held at the BIS offices on 10 November 2011, interesting anecdotal evidence was presented by a franchisees' association, in which it was explained that serious disputes, between a car dealer franchisor and a number of franchisees, had arisen from competition law grievances, and which had been difficult to resolve absent any feasible method of joining all of the parties to the dispute. In fact, several of the franchisees did not wish to proactively join any litigation against the franchisor, due to the fear of retaliation. This observation was especially interesting, given that franchisor-franchisee disputes were some of the earliest

actions to be litigated under the Ontario and Australian opt-out class actions regimes in the competition field.

Q10. The Government is seeking your views on whether the proposed policy objectives for extending collective actions, taking into account redress, deterrence and the need for a balanced system, are correct.

We believe that the aims put forward in the Consultation for any collective competition redress regime—to allow claimants (in particular, consumers and SMEs) access to compensatory redress; to contribute to the deterrence of unlawful anti-competitive practices; and to ensure that the UK competition enforcement system is more balanced as between public and private action—are the correct objectives. This is subject to three additional comments.

First, and as a matter of substantive law, we would reiterate that the **main** aim of any compensatory collective action must be to ensure that the members of the class represented in the claim receive adequate compensation for the harm done to them by the anti-competitive practice. As a matter of European law, per *Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619 (ECJ), that compensatory amount must include three elements: the overcharge caused by the cartel; any interest on that overcharge; and any profits lost by claimants as a result of the cartel activity. We further note that the importance of the compensatory principle was endorsed, at domestic level, in *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2008] EWCA Civ 1086, [2009] Ch 390, where the Court of Appeal stated that the claimant 'is entitled to be compensated for any loss it has suffered as a result of the cartel, no more and no less' (at [161]). In doing so, the Court of Appeal rejected the availability of restitutionary damages for breaches of competition law, and the plea for account of profits in that case was ultimately struck out.

Secondly, as with **all** claims for damages against tortfeasors, this right to compensation will necessarily have a deterrent effect on anticompetitive behaviour. We see no difference between unitary and collective litigation on that point. However, we do not believe that any collective redress system for competition claims should be framed so as to include elements that are intended **only** to deter (and therefore punish) collusive or exploitative activity. Deterrence will be a by-product of an effective compensatory regime. We agree with the notion that civil courts, hearing actions brought by private claimants, are not the appropriate venue for punitive action against cartels and other anti-competitive behaviour. In that regard, we agree with the statement of Longmore LJ in *Devenish*, where it was stated that, '[t]he only real argument in favour of an order for account of profits is the argument of policy that cartels are a notorious evil and the civil courts should in some way provide an

incentive for their eradication by making such an order. ... But it does not seem to me to be right for the courts to take this step on their own initiative' (at [149]). We also agree with the observations previously made by the Civil Justice Council (*Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions: Final Report* (November 2008) at 79) that:

> Effective enforcement would involve compensatory damages awards, which were appropriate according to established substantive law principles. It is as a consequence of its primarily compensatory function that effective private enforcement arises, through which it provides a real deterrent effect that such actions are said to have on unlawful conduct. In this context, both the OFT and the European Commission have publicly stated that they see private actions by victims in competition law as a necessary complement to their own public enforcement efforts, which are intended to be regulatory and where necessary punitive.

If the principle that private damages claims are not a vehicle for punishing unlawful anti-competitive behaviour is respected, the correct balance—between public enforcement (which is intended to punish, whether through an administrative procedure against undertakings or through prosecution of individuals), and private actions (which are intended primarily to compensate), with *both* types of action having deterrent *effect*, but to differing degrees—should be maintained.

Thirdly, we believe that a further prime objective of any extended collective actions regime is to achieve fairness and balance for **defendants** as well. In that regard, we point to some of the 'key findings' made by the Civil Justice Council, in the abovementioned November 2008 report, in which the Council noted (at 17–18):

> (2) Existing collective actions are effective in part, but could be improved considerably to promote better enforcement of citizens' rights, whilst protecting defendants from non-meritorious litigation;
>
> ...
>
> (6) Collective claims can benefit defendants in resolving disputes more economically and efficiently, with greater conclusive certainty than can arise through unitary claims;
>
> (7) The Court is the most appropriate body to ensure that any new collective procedure is fairly balanced as between claimants and defendants, the latter of which should be properly protected from unmeritorious, vexatious or spurious claims as well as from so-called blackmail claims; ...

We endorse all of the abovementioned 'key findings', which will protect defendants from both ill-founded claims and from imbalanced procedure.

Q11. Should the right to bring collective actions for breach of competition law be granted equally to businesses and consumers?

We strongly believe that the collective action should be available for groups of victims of cartels and other anti-competitive behaviour, *whether they are individual consumers or businesses*. Both groups of claimants may equally be the victims of price-fixing or other anti-competitive behaviour; and the legislative favouring of one group at the expense of the other (as occurred, e.g., under the s 47B regime, which permits consumers to be represented by a specified body but excludes SMEs from any such representation) is, in our view, unwarranted and flawed.

Further, any limitation of the right to collective redress—to end-consumers only, for example—would fall short of achieving the government's policy aim; and it would also contravene the legal standard required by EU law, per *Courage Ltd v Crehan* [2001] ECR I-6297 (ECJ), which is to enable all victims of breaches of competition law to gain the entitlement to rely on competition law breaches, so as to obtain redress in respect of the loss suffered.

However, we do not suggest that businesses and consumers should always receive absolutely equal treatment within the context of a collective action—even if that action is to be pursued as an opt-out collective action. When certifying a claim as a collective action, it will be necessary for the CAT to consider matters such as the nature of the claim, its surrounding circumstances, the size of the individual claims, the number of claimants, and a number of other matters (under the numerosity, suitability, and superiority criteria which form part of the certification matrix, as discussed in Q15 below). Ultimately, the CAT must decide whether the use of an opt-out collective redress mechanism is the best way to manage the case brought before it, and when applying the certification criteria, we do not believe that *equality of outcome* (i.e., to certify or to not certify, and upon what common questions) for all potential claimants can, or should, be guaranteed—what is required is that they (and the defendants) should all be treated *fairly*.

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

We are unsure how the Government fears that collective actions might be used as a vehicle for anti-competitive information sharing, but we suggest that the current powers of the CAT relating to confidentiality and disclosure of evidence are more than adequate to address any perceived problem, and have been used by the Tribunal in cases before it (see, e.g., the orders made in the case of *Emerson Electric Co v Morgan Crucible Co plc* (Order dated 13 Dec 2007, by the Chairman of the

CAT, Marion Simmons QC; and *Albion Water Ltd v Dwr Cymru Cyfyngedic* [2011] CAT 42 (Chairperson, Vivien Rose).

Furthermore, the *CAT Guide to Proceedings* (Oct 2005) deals extensively with confidentiality issues (specifically in section 13, 'Confidentiality'), thus emphasising the Tribunal's wide powers to order confidential treatment for particular documents and to control disclosure of evidence (including in CAT judgments).

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

Given the necessary limits on the resources available to public enforcement, we strongly believe that the Government's aim of increasing the effectiveness of access to justice for victims of unlawful anti-competitive activity can **only** be fully achieved by allowing collective actions in stand-alone, as well as follow-on, cases. Our comments in relation to Q2 above (e.g., the comments made by Sir Gerald Barling in relation to the gap which exists with stand-alone actions) apply equally to collective action claims.

Indeed there is, we suggest, an even *greater* case for collective actions in stand-alone cases, where the fact of the breach of competition law needs to be proven, for two reasons.

First, given the resource-intensive nature of such claims, and the difficulty of finding evidence sufficient to support the case, **only** the prospect of bringing a successful opt-out collective action is likely to mean that sufficient resources will be available to investigate and bring forward more stand-alone claims than the current small number appearing before the courts. The need for sufficient funds to investigate a claim thoroughly will, we suggest, act as a self-limiting control against abuse of the procedure. A third party funder/ATE insurer will not wish to pursue unprofitable lines of enquiry endlessly, and will similarly not wish to commence proceedings against well-resourced defendants, unless there is clear evidence of a breach of competition law, such that there is a good prospect of success in the claim and a profit for the funder/recoverability for the ATE insurer from the damages recovered.

Secondly, notwithstanding that s 47B of the Competition Act 1998 has proven remarkably ineffective in facilitating follow-on collective actions brought by the specified body, Which?, there is, at least, the legislative facility for such actions, which could be widened by the appointment of further specified bodies if the Government felt so inclined. However, the capacity to bring stand-alone collective actions has been (legislatively) ignored under the Competition Act, and it is, we suggest,

important that the ability to bring such claims before the CAT be placed on an equivalent legislative footing with follow-on claims. We agree with the Consultation that, given the Canadian experience that stand-alone actions were certainly not unknown in that jurisdiction (on the basis of research conducted by one of the authors to this Response, about a quarter of all cases between 1997—2008 were stand-alone actions, as noted in fn 54 of the Consultation), an opportunity to bring stand-alone actions, on an opt-out basis under a certified collective actions regime, **ought** to be provided for in legislation. To deny this would (we agree), 'significantly limit the amount of redress and deterrence generated by the reforms' (Consultation, [5.13]).

Q14. The Government seeks your views on the relative merits of permitting opt-out collective actions, at the discretion of the CAT, when compared to the other options for collective actions.

We strongly believe that an opt-out class action should be available to litigants in competition law damages claims. It will be implicit under the 'superiority criterion' that an opt-out class action can **only** be used, if it is preferable to other forms of resolution of the dispute. In that regard, we endorse the wording of the superiority criterion contained in '*Draft Rules for Collective Proceedings*' (available on the Civil Justice Council website, under 'European Consultations', 'Collective Redress'), which states, as draft CPR 19.20(2)(b), that:

> In deciding whether to certify the proceedings as appropriate for collective proceedings, the court must be satisfied by the applicant that the collective proceedings are the most appropriate means for the fair and efficient resolution of the common issues.

This indicates that an opt-out collective action could only be certified in the CAT if **none** of the following are preferable: unitary litigation; consolidation and joinder; a representative action (if available); a group litigation order; a test or lead case; a s 47A action; a s 47B action; or an opt-in collective action (if that device is included in the draft CAT rules, as it was in the draft rules which were intended to underpin the Financial Services Bill opt-out class action for financial services claims). In that regard, we consider that the terminology of 'most appropriate', as used in the Draft Rule above, should be intended to be synonymous with 'preferable' or 'superior', and that, further, the criterion should not be taken to mean that an opt-out class action would be the sole way of determining the common issues, only that it would be the preferable way, in all the circumstances.

The advantages of an opt-out regime have been well-documented prior to the release of this Consultation, but to recap on some of the more significant benefits which an opt-out regime affords

(these points are adapted from Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, 2004), Table 2.1, pp 37–38, and the sources cited therein):

- under an opt-out regime, defendants are unlikely to have to deal with very many claims other than those made in the class action—and if they do, then they know more precisely how many class members they may face in subsequent proceedings (by reference to the number of opt-outs);

- opt-out regimes enhance access to legal remedies for those who are disadvantaged either socially, intellectually, economically, or psychologically, and who would be unable, for one reason or another, to take the positive step of including themselves in the proceedings or proactively making the decision to sue the defendant;

- opt-out regimes increase the efficiency and the avoidance of multiplicity of proceedings for all concerned (all litigants, legal representatives, and court);

- access to justice is the most important rationale for class actions (more important than judicial economy or deterrence), and on that basis, inclusiveness in the class should be promoted (i.e., the vulnerable should be swept in);

- safeguards are part and parcel of an opt-out regime, to prevent class members from being 'roped in' against their will, e.g., with adequate notice explaining opt-out rights; with permission to opt-out later in the action; and with the application of the rules of private international law;

- for each class member, the goal of individual choice whether or not to pursue a remedy, can be achieved even if the decision for the class member is whether to continue proceedings, rather than whether to commence them;

- opting-out more effectively ensures that defendants are assessed for the full measure of the damages which they have caused (via an aggregate, class-wide assessment of damages), rather than escaping that consequence simply because a number of class members do not take steps to opt in;

- the meaning of silence, in class actions jurisprudence, is equivocal and does not necessarily indicate indifference or lack of interest, so class members should not be denied whatever

> benefits are secured by the class action, by failing to act at an early stage of the action—in cases of economic loss it is fairer for the silent to be considered as part of the class than not.

Our strong support for an opt-out regime is tempered by three points.

First, we envisage an 'opt-out with brakes', such that the certification criteria, and procedural matters of conduct, must be fair, proportionate, and balanced for both claimant and defendant sides to the dispute. Furthermore, we reject any notion that an opt-out action should be *presumed* in price-fixing activity in all cases. Instead, we endorse the 'Key finding #9' which was put forward by the Civil Justice Council, in its 2008 report to the Lord Chancellor, *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions: Final Report* (November 2008), *viz*:

> There should be no presumption as to whether collective claims should be brought on an opt-in or opt-out basis. The Court should decide, according to new rules, practice directions and/or guidelines, which mechanism is the most appropriate for any particular claim, taking into account all the relevant circumstances. In assessing whether opt-in or opt-out is most appropriate, the court should be particularly mindful of the need to ensure that neither claimants' nor defendants' substantive legal rights should be subverted by the choice of procedure.

Secondly, any opt-out collective action must revert to opt-in at some point, in order to give the class members the opportunity to prove their individual issues (if any) and recover damages (and only if liability is found on the common issues, or the case is settled by the defendant). At some point, the class members will have to 'put their feet on the sticky paper', and opt-in, so as to prove their individual issues (including their quantum of loss or harm).We favour an opt-out regime which converts to opt-in only **after** any judgment or settlement in the matter has been concluded. In particular, we consider that the Government, and rules-drafters, should be mindful of the potential for opt-out regimes to be judicially converted to opt-in regimes prior to proceedings even being commenced, and to resist any such attempt to contravene 'the spirit' of an opt-out regime in that manner. For example, Australian case law has thrown up the conundrum of class members being under an obligation to take a positive act to join the class—by proactively entering into a client retainer with the law firm which has the conduct of the matter, or by entering into a contract with a third party funder which is financing the litigation—because, from the outset of the action, the class definition is worded so as to impose that 'tie'. Both Canadian and American case law has also manifested attempts (sometimes successful) to invoke a 'proof of claims' procedure, whereby if the class action is certified, then the action should be bifurcated, so that trials of individual liability issues would be held prior to a common issues trial. We believe that both examples manifest an intention to

contravene the spirit of an opt-out regime, and should be judicially resisted. (For further discussion of the conundrums which have arisen in Australian, Canadian and American case law, to do with when/how to 'close the class', see, e.g.: Mulheron, 'Opting In, Opting Out, and Closing the Class: Some Dilemmas for England's Class Action Lawmakers' (2010) 50 *Canadian Business LJ* 376.

Thirdly, we consider it important for litigants and judges alike to appreciate that there is a substantial body of opt-out class actions jurisprudence in other common law jurisdictions (especially in Australia, Canada and the United States), from which we can learn and draw upon, in order to avoid the mistakes which may have been made elsewhere, and to adopt the 'best practice' which has been evident in these other jurisdictions. In other words, the CAT in particular, and the civil procedure system in England in general, are not embarking upon a new collective actions regime in isolation, and whilst the jurisprudence from elsewhere can be nothing other than persuasive (at best), it may be beneficial to have regard to it, from time to time, in order to ensure that any newly-introduced opt-out regime works as well and as fairly as possible, for all parties, and for the Tribunal.

DESIGN DETAILS OF AN OPT-OUT COLLECTIVE ACTION REGIME

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

We strongly agree with the Consultation, that a 'thorough preliminary process of certification is essential', at the outset of any proposed collective action. If one or more of the certification criteria is not satisfied, then the action cannot proceed as a collective action.

The suggested list of certification criteria (at p 55 of the Consultation), seems to us to be broadly complete and appropriate (subject to a couple of comments below). Experience from other opt-out jurisdictions has shown that each of the certification criteria mentioned in the Consultation has been at issue in competition law cases brought on an opt-out basis, and in some of these cases the attempt to bring an opt-out class action has failed precisely because the certification criteria were not met. In other words, these criteria have *actually worked*, in preventing some actions from going forward which were not suitable for opt-out collective action treatment.

In the discussion below, we have set out the general criteria proposed in the Consultation, and have noted some comments about each criterion, and some sub-issues that have, in practice, arisen under that criterion in the Canadian jurisdiction (by way of example). We hope that this brief

discussion gives a sense of how the certification process will (and should) be effective in curtailing any unfair or improper use of an opt-out collective action regime. This discussion is drawn from Mulheron, *Competition Law Cases under the Opt-Out Regimes of Australia, Canada and Portugal* (A Research Paper for BERR, October 2008), ch 7, pp 26–45, and more details, and relevant cases, are to be found at that source.

We note, at the outset, that the claim brought in the CAT will have to show a valid cause of action on the face of the pleading—a seemingly obvious point, but one which has occasionally given rise to problems in Canadian competition law class actions (where, e.g., the damage caused by an alleged conspiracy among cartelists has not been adequately pleaded).

Preliminary merits: We do not favour the test which is cited in the Consultation (at A.3), which is adopted from the Ontario Law Reform Commission's recommendation in its *Report on Class Actions* (1982). We note that the Ontario legislature did not ultimately accept the Ontario LRC's recommendation in that regard, choosing to avoid this preliminary merits criterion in the Class Proceedings Act 1992 enacted for that jurisdiction.

Instead, we favour the types of preliminary merits criteria that were promulgated in the *Draft Court Rules for Collective Proceedings* (published 2 February 2010), *viz*:

- that the representative claimant should be required to attach to its claim form a written declaration that the party believes that the claim 'has real prospects of success';

- secondly, that the CAT may hear a defendant's strike-out motion or summary judgment application at the same time as the certification hearing;

- thirdly, at the certification hearing, the court must have regard to 'all the circumstances', when determining whether to authorise the proceedings as appropriate for collective action; and

- fourthly, that a court may consider merits, on a preliminary basis at least, when assessing 'the costs and the benefits of the proposed collective action', as it would be required to do when assessing whether the collective action was 'the most appropriate means for the fair and efficient resolution of the common issues'.

These various requirements were contained, e.g., in draft CPR 19.20(2)(c), CPR 19.18 (3)(c), and CPR 19.20(3)(a) of the *Draft Rules for Collective Proceedings* (published 2 February 2010, and

available on the Civil Justice Council website, under 'European Consultations', 'Collective Redress'). See, for further discussion of the preliminary merits criteria, and the relevant draft rules of court, Mulheron, 'Recent Milestones in Class Actions Reform in England: A Critique and a Proposal' (2011) 127 *Law Quarterly Review* 288, 303–4.

Minimum numerosity: We agree that the numerosity of the class must exceed a minimum threshold (which we would suggest as two persons, adopting the Canadian standard for minimum numerosity).

With a notable exception in an early case in Australia, in which it was not clear whether there were seven class members in a price-fixing case (the case failed to progress for other reasons too), minimum numerosity has not been an issue in competition law cases. The problem has sometimes been at the other end of the spectrum, with 200 million class members, or more! With such large classes, an imprecise class definition or problems of manageability, have sometimes defeated certification (or, at least, the claim had to be repleaded to satisfy the certification requirements).

We note the suggested formula for minimum numerosity contained in CPR 19.20(2)(a) of the *Draft Rules for Collective Proceedings* (published 2 February 2010), that the class must constitute 'an identifiable class of persons'.

Commonality: We agree that there must be at least one common issue of law or of fact, to be determined in the collective action.

One of the key disputes about commonality, in North American jurisprudence, has been whether the loss suffered by class members as a result of alleged or proven competition law infringements can comprise a common issue, ie can loss be proven on a **class-wide** basis? Some attempts to do so on contested certification motions have turned on economic models, industry data, and use of expert evidence, with mixed success. This issue has been complex and bitterly-fought in other jurisdictions, and we would expect that particular issue of commonality to also occupy detailed attention in opt-out collective actions brought before the CAT, not least as a result of the complication (not present in other common law jurisdictions having class actions) of the pass through defence.

Furthermore, conflicts of interest arising among class members (some of whom may have passed on the price-fixing component to others down the line) manifest frequently in competition law class actions. Whether those conflicts can be resolved by a re-definition of the common issues, for example by sub-classing, by redefinition of the class, or by excluding some class members from the class action altogether, will dictate, to a great extent, whether a sufficient commonality is established.

We note the general requirement, in CPR 19.16, definitions section, of the *Draft Rules for Collective Proceedings* (published 2 February 2010) that the claim would need to raise the 'same, similar or related issues of fact or law'. We do not favour that precise terminology, given the problems that have arisen with that commonality formula in Australian jurisprudence. Instead, we would favour a simpler terminology, in that 'a common issue of fact or law' should suffice.

Superiority: We agree that a collective action brought on an opt-out basis must be superior to other forms of dispute resolution (whether those alternative forms are curial, or extra-curial—the latter of which may encompass, say, an effective Ombudsman's scheme). (Please refer to our comments to Q14 above.)

North American jurisprudence in relation to competition law infringements, whether alleged or proven, has indicated a number of superiority issues of relevance in such cases. These have included (simply by way of illustration, without any attempt to be exhaustive): whether a small number of common issues will render the class action inferior to other forms of dispute resolution; whether no deterrent effect whatsoever could be achieved by an opt-out class action (an issue which should not be relevant in the UK where the principle of compensatory damages applies); whether the price overcharge has been so small, both individually and globally, that the need for a class action is redundant; and whether it is plain that the size of the individual overcharge or other damage is so large that potential class members will be willing to sue individually.

It should be noted that, where certification is preparatory to an agreed settlement ('certification for the purposes of settlement'), the criterion that a class action is superior to all other forms of dispute resolution has been relaxed somewhat in some North American jurisprudence. After all, if a joint application for certification for settlement is made, there is not going to be any other form of dispute resolution: the dispute is resolved. However, for contested certifications for trial purposes, the superiority criterion has proven a considerable hurdle for some classes to overcome, in competition law infringement cases.

We note the formula proposed, in CPR 19.20(2)(b) of the *Draft Rules for Collective Proceedings* (published 2 February 2010), that a collective action would need to be the 'most appropriate means for the fair and efficient resolution of the common issues', in addition to the fact that the collective action should be 'appropriate [to] further the overriding objective' (per CPR 1.1(2)).

Adequacy of representation: We agree that the representative claimant must be an adequate representative.

The type of representative claimant who has standing is very important, and may of itself be crucial in establishing adequacy of representation—as indicated elsewhere in this Response, we consider that the representative claimant could be any one of the following: an ideological claimant which is statutorily designated to be an appropriate representative claimant for collective actions; an ideological claimant which is able to satisfy the adequacy criterion; a directly-affected claimant, whether individual or corporate; or a regulatory body such as the competition authority (please see Q22 below).

Sub-classing among the class of affected consumers or SMEs may require separate sub-class representatives, each of whom must be adequate (e.g., separate sub-class representatives for producers, distributors, intermediaries, and end-consumers). The certification hearing should aim to ensure that no conflicts of interest exist, or may arise, between the interests of the various class members, or to raise any other doubts with respect to their ability to represent the class members fairly and adequately. If there is material to suggest that the class representative has 'irreconcilable conflicts' with some other members of the proposed class, then certification must be denied or a separate sub-class presented for certification.

We suggest that, as examples of factors governing adequacy of representation, the CAT will need to have regard to matters such as whether the representative claimant:

- understands or has experienced the grievances for which the class members seek redress;
- is a suitable spokesperson for the class members;
- has demonstrated a willingness to seek instructions from class members, where required, and to keep them informed of key developments in the action;
- has retained competent and experienced lawyers to represent the class; and
- has adequately participated in the course of the litigation, leading up to the certification hearing.

However, we do not believe that such matters need to be legislatively provided for (either in court rules or anywhere else), and that this detail will be gradually developed judicially from case to case.

Finally, and on a dissenting note, we are not convinced that 'typicality' should play any part in the evaluation of the adequacy of the representative claimant. Jurisprudence from elsewhere has shown this requirement to be ill-defined, duplicative, and unnecessary. We would suggest that it would be desirable to remove that particular terminology from the adequacy criteria.

We note that the formula proposed in CPR 19.21(3) of the *Draft Rules for Collective Proceedings* (published 2 February 2010) was that the representative claimant be an 'appropriate person'.

Financial means to cover adverse costs: We agree that the representative claimant must show that it has sufficient funds (whether from its own resources, or from external funding sources) to cover the adverse costs of the defendant, should the representative claimant fail in the action.

We believe that this option, of expressly requiring financial adequacy as a certification criterion, is far preferable to any of the following:

(1) relying solely upon security for costs applications to secure the defendant's financial position;

(2) considering financial adequacy of the representative claimant as only one factor in the judicially-set certification matrix, which can result in inconsistent decisions about adequacy, from case to case; or

(3) discovering, at the end of the class action, that the defendant is exposed to bearing its own costs because the representative claimant has no assets with which to meet an adverse costs order.

In that regard, we strongly endorse the requirement, contained in CPR 19.21(2)(b)(iv) of the *Draft Rules for Collective Proceedings* (published 2 February 2010), of financial adequacy of the representative claimant.

Other criteria, not mentioned in the Consultation: In addition to the criteria listed in the Consultation at A.3 (p 55), further criteria which we believe to be essential for the certification process are as follows:

- **an adequate class definition.** The definition has to satisfy three purposes, according to Canadian case law jurisprudence:

    - it has to identify the persons who have a potential claim against the defendant;
    - it defines the parameters of the claim, so as to identify those persons bound by the result of the action (whether by judgment or settlement); and

- it describes those who are entitled to notice of certification (and other notices required during the action).

It has been notable, in North American class action jurisprudence, that key issues of class definition in competition law cases have been whether (1) a class of direct purchasers can be certified (and what role the passing-on defence plays in the jurisprudence); and (2) whether classes of end-users/indirect purchasers can be certified (and whether double-recovery is an issue for such claimants). Further issues to do with class definition have concerned: whether class members can even tell if they are indeed class members (without opening up a computer, for example, and seeing what sort of DRAM they have!); and class definitions in which there was no cutting-off point in time, so as to ensure that the class definition is closed and therefore ascertainable.

- **an express rule about standing against multiple defendants.** Cartel litigation, of its very nature, raises the so-called 'standing against multiple defendants' issue, because a number of alleged cartelists will necessarily be involved. The question arises as to whether every representative claimant (and/or every class member) has to have a prima facie cause of action against every defendant sued in the action. Ontario has answered that question, 'no'; whereas Australia has answered that question (in some cases), 'yes'. This issue was expressly dealt with in the Financial Services Bill 2010, where the Ontario legislative position was preferred. (See the discussion on this point in, e.g., Mulheron, 'Recent Milestones in Class Actions Reform in England: A Critique and a Proposal' (2011) 127 *Law Quarterly Review* 288, 307–10). We believe that this issue should also be expressly clarified in any newly-developed legislation governing opt-out collective actions in the CAT, otherwise there is real potential for unsatisfactory, expensive, and difficult satellite litigation on the point.

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

Punitive damages: We suggest that it is instructive to consider the current position on punitive damages in relation to (non-collective) competition damages claims, as set out by Lewison J (as he then was) in *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch), aff'd: [2008] EWCA Civ 1086. The claimants claimed (among other things) punitive damages against members of the *vitamins* cartel, which had been the subject of an infringement decision of the European Commission. The basis of the claim was the principle in *Rookes v Barnard*[1964] AC 1129 (HL), wherein Lord Devlin stated that punitive damages may be available, at the discretion of the court, where (as a second category of availability—the other two categories had no application in the case)

the defendant committed a wrongful act calculating that any damages awarded against him would be outweighed by the gain to him from committing the act.

Since, in *Devenish*, the Commission had imposed fines in relation to the vitamins cartel's activity on a number of the defendants (and, in some cases, would have fined more, but for the application of its leniency programme), Lewison J held that he was bound by EU law (and the duty of sincere co-operation with the EU institutions) to respect the Commission's decision on the degree to which the cartel participants should be punished. Accordingly, he could not award punitive damages in a damages claim that followed on from a Commission infringement decision.

This decision leaves open two particular questions. First, the question arises as to whether punitive damages can be awarded following an OFT fining decision, in contrast to EC infringement decisions. We suggest that, for the sake of consistency, the better view should be that the *Devenish* principle applies to OFT decisions too.

Secondly, the question arises as to whether punitive damages should be available in stand-alone claims. We suggest that this second question can most sensibly be left to be developed by the courts following the general law, in the event that a claim for punitive damages is brought. We do not see any reason, in principle, for a different rule to apply to collective actions. Since an award of punitive damages is discretionary, and has yet to occur in the competition context, we suggest that specific legislation is likely to be superfluous. In any event, if an opt-out collective action is introduced by legislation, where the amount of damages awarded in favour of the class is likely to be equal to the gain made by the infringing parties, then that, of itself, would prevent the *Rookes v Barnard* second category of punitive damages from applying.

Treble damages: We agree that treble damages should **not** be available in competition law cases. However, we note that, per the principle in *Manfredi v Lloyd AdriaticoAssicurazioniSpA* [2006] ECR I-6619 (ECJ), the principle of 'full compensation' means that any compensatory measure must include three elements, the cartel overcharge, interest on that overcharge, and any profits lost by claimants as a result of the cartel activity.

Furthermore, we agree with the opinion of other commentators (e.g., A Riley and J Peysner, 'Damages in EC Antitrust Actions: Who Pays the Piper?' (2006) 31 *European Law Review* 748, 751) that 'there is also a strong argument that, to effectively protect Community law rights, interest from date of damage should be available', per *Marshall v Southampton and South-West Hampshire AHA (No2)* [1993] ECR I-4367). Hence, the non-availability of treble damages must be tempered, in light

of the substantial damages payments for interest which are potentially available to claimants in these cases.

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

We believe that the 'loser pays' rule **should** be maintained for collective actions, as it represents the most effective method of guarding against abusive and vexatious litigation and tactics (by all parties).

In that regard, we agree with the Civil Justice Council's recommendation #9, that '[t]here should be full costs shifting', in relation to any newly-introduced collective actions regime, for the reasons which the CJC describes in its November 2008 report, *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions: Final Report*. In particular, we agree with its observation that 'costs-shifting is a deterrent against speculative or so-called blackmail litigation, unless the claimants are impecunious, in which case the court's existing powers to award security for costs should provide protection for defendants against such 'blackmail claims' (at 179).

We further suggest that, given the retention of costs-shifting, express provision should be made within any newly-developed CAT rules for the defendant to apply for a security for costs order, if it becomes apparent (at or after the time that the collective action is certified) that the representative claimant is not likely to be able to meet any costs order which may be made against that party. In that regard, we endorse the draft rule, CPR 25.13(2)(h) of the '*Draft Rules for Collective Proceedings*' (available on the Civil Justice Council website, under 'European Consultations', 'Collective Redress'), which provided the insertion of the following, in CPR Pt 25, 'Security for Costs':

> the claimant has been authorised to act as the class representative in collective proceedings under rule 19.19 and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so.

However, our view that costs-shifting should be retained, for collective actions claims in the CAT, is tempered by three caveats.

First, we suggest that the CAT should have the same discretion as the High Court to vary the application of the rule in appropriate cases, and that the circumstances described in Q18, below, may justify a departure from the costs-shifting rule, in appropriate circumstances.

Secondly, we do not believe that a collective actions regime will succeed unless **only** the representative claimant/s (and not the class members) are liable for adverse costs. Given the Consultation's premise (which we share) that the main reason for the lack of damages claims against cartelists for anti-competitive behaviour is the dispersed, and individually low, level of damages, if the class members (i.e., the represented claimants) are not to be shielded from all adverse costs risk, the Government's suggested collective action policy will fail.

Finally, if necessary, the CAT should be permitted to make orders controlling or capping costs *ex ante*, to prevent the defendants from using costs as a tactic to stifle meritorious claims. In that regard, we endorse the comments made by the Civil Justice Council, in its November 2010 report (at pp 175–78), that costs protection, protective costs orders, costs capping, and costs budgeting, are 'sophisticated costs control tools' which have been developed for complex litigation—albeit that some of these measures 'are unlikely to be fully effective against a deep-pocketed defendant who is prepared to invest large sums of money defending a claim in the full knowledge that they are unlikely to recover' (at 178). The way in which costs-capping, costs protection, and collective actions have interacted, and may do so in the future, is discussed in detail, in Mulheron, *Costs and Funding of Collective Actions: Realities and Possibilities* (Research Paper for the European Consumers' Organisation BEUC, Feb 2011), Part III, and will not be explored further here.

Q18. 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 more appropriately be met from the damages fund?

We believe that, in some circumstances, costs-shifting **should** be departed from, or that, in appropriate cases, any adverse costs ordered against the representative claimant should be covered by a so-called 'damages fund'. We suggest that such derogations from the usual rule/orders against a damages fund (which we collectively call, 'Alternative Costs Measures') could be handled in two ways.

Statutory derogation: Alternative Costs Measures could feasibly be permitted where the circumstances governing derogation have been *legislatively* specified.

For example, we have in mind the type of provision that is evident in Ontario and Nova Scotia, Canada, where their respective class actions statutes provide that, in exercising their discretion with respect to costs (and whether to depart from the usual costs-shifting rule which applies there), the courts in these jurisdictions may consider whether the class action 'was a test case, raised a novel

point of law, or involved a matter of public interest', in which case no costs-shifting may be ordered (see, e.g., s 31(1) of Ontario's Class Proceedings Act 1992).

However, we note that these three 'exceptional criteria' have not been legislatively defined in those statutes, and that the provision has not necessarily proven to be 'plain-sailing' for litigants. For example, judicial interpretations of what the exceptions mean have not always been consistent. Even proving two out of the three 'exceptional criteria' has not necessarily been sufficient to show that costs-shifting should be departed from. Furthermore, even if none of the exceptional criteria is made out, some Ontario courts have indicated that they retain a general residual discretion not to award costs against a losing representative claimant in any event.

Nevertheless, despite this somewhat muddled landscape, we believe that even though any statutorily-introduced directives to the CAT by which to soften the potentially harsh effect of costs-shifting depends ultimately on judicial discretion, the very presence of the exceptional criteria conveys an important reminder to both representative claimant and defendant alike that costs-shifting **can** be departed from in such cases. Furthermore, we believe that providing for the potential derogation from costs-shifting, via legislation, would have two other advantages, for collective actions cases:

- legislative criteria upon which the discretion can be exercised sets some definite reference point for the CAT, by which to determine whether costs-shifting should be departed from, and adverse costs not awarded against the representative claimant;

- by taking the steps to set some legislative criteria, the legislature has invited the debate about whether to depart from costs-shifting, thereby suggesting that the CAT would be more ready to consider departing from costs-shifting, than if no criteria were mentioned at all.

Judicial derogation: Regardless of whether or not legislative criteria are stipulated, we also consider that, over time, the CAT will develop a body of jurisprudence as to the circumstances in which costs-shifting may properly be departed from in opt-out competition law cases. A notable feature of the Ontario class actions experience is that the courts have identified a number of specific scenarios in which costs-shifting can be avoided, which have 'added flesh' to the exceptional criteria, and which have assisted both litigants and judges to more clearly identify whether costs-shifting would be likely to be departed from in any given case.

One of the authors to this Response conducted a comprehensive study of Ontario class proceedings cases in 2010, for the purposes of determining in what precise circumstances a losing

representative claimant has managed to avoid the burdens of costs-shifting in class litigation in that jurisdiction. The factors below have often been considered in combination by the Ontario courts, rather than conclusively in their own right (see, for further detail, Mulheron, 'Costs-Shifting, Security for Costs, and Class Actions: Lessons from Elsewhere' in D Dwyer (ed), *The Civil Procedure Rules Ten Years On* (OUP, 2010), ch 10):

- the class action constituted a true test case, the result of which would resolve other class litigation on foot;
- the class action proceeded under the unusual circumstances of an appellate court overruling its own decision (unexpectedly for the litigants);
- the class action was of sufficient magnitude and importance so as to impact upon an extremely wide community;
- the class action had the potential to achieve a large degree of behaviour modification/deterrence across an industry;
- the class action was beneficial in clarifying an uncertain point of law;
- the class action had persuasive effect either in other jurisdictions or across other industries;
- a costs award against the representative claimant in the class action would have a 'chilling effect' upon future potential litigants who were minded to run similar types of cases;
- Parliament had seen fit to enact legislation that dealt with the subject matter of the class litigation, indicating its importance to society as a whole;
- the class action was seeking to challenge/test/improve the governmental regulation of an industry;
- the class action involved matters of considerable historical and societal importance;
- the class action was brought on behalf of class members who were traditionally seen as a disadvantaged group in society.

These types of factors would, we suggest, be of interest, should the CAT be requested to either make no order as to costs against a losing representative claimant, or to make an order that such costs be covered by a damages fund.

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

We note the government's concern in relation to contingency fees for opt-out collective damages actions, and its suggestion (in Box 6, at p 35 of the Consultation) that no contingency fees should be available for the proposed collective action regime.

However, we **disagree** with the Government's preliminary view in this regard, and suggest that such a view may be at variance with (1) the CAT rules themselves; (2) recent legislative provisions governing contingency fees; and (3) government policy on civil legal costs in other areas of the law. Dealing with each in turn:

The CAT rules: We note that the Civil Justice Council, in its November 2008 report, *Improving Access to Justice through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions: Final Report*, noted that '[c]ollective actions before the CAT would ... arguably permit contingency fees' (and cited, for that proposition, 'the combined effect of s 12 of the Enterprise Act 2002 and the definition of non-contentious business in the Solicitors' Act 1974).

Recent legislative provisions governing contingency fees: As a result of the review of civil justice costs by Lord Justice Jackson (*Review of Civil Litigation Costs: Final Report* (Dec 2009)), and in light of the recommendations contained in ch 12 of that Report, the Government has brought forward legislation to legalise 'damages-based agreements', for lawyers to be remunerated according to a percentage of damages recovered in other areas of civil redress (see the Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 45). As of April 2013, a DBA may be entered into by a lawyer, for <u>any</u> contentious business.

Furthermore, Lord Justice Jackson expressly acknowledged, in his Report, that insofar as collective actions were concerned (at ch 33, [4.5]):

> If the recommendations set out in chapter 12 above are accepted, it will be legitimate for both solicitors and counsel to conduct litigation on a contingent fees basis. This method of funding may be appropriate for group action where (a) the lawyers have sufficient confidence in success, and (b) the claimants receive independent advice that the terms of the proposed contingency fee agreement are reasonable.

Hence, it was clearly the intention of the author of the costs reform envisaged by the LASPO Act that collective redress **would** be able to take advantage of the funding mechanism of contingency fees. No carve-outs or exceptions to that scenario were envisaged by Lord Justice Jackson. Nor have any been suggested in the LASPO Act 2012 itself.

Governmental policy: We also question whether the reasons advanced by the Government in the Consultation for not extending that policy to collective competition actions bear close examination.

First, the Government is concerned that a contingency fee may incentivise lawyers to artificially inflate the number of claimants. This is misconceived: if the claim is brought on an opt-out basis, the number of claimants in the class bringing the claim will be constant, and not capable of inflation by the claimant's lawyers (this position would be different for opt-in collective redress, but this is not what is proposed). Since the class definition will need to be certified by the CAT, the number of claimants in the class is outside the control of the claimants' lawyers. In any event, artificially inflating the number of claimants—even on the premise that it was possible—in order solely to claim higher fees, would be fraudulent (whatever fee structure is permitted) and the lawyers in question would be liable to prosecution and imprisonment.

Secondly, the Government is concerned that contingency fees would encourage spurious litigation and place an unjustified cost on the defendant. Again, this appears misconceived. Any opt-out collective damages claim will need to be certified by the CAT: this will prevent spurious claims being brought as collective actions. Furthermore, under the DBA regime, only the claimant's lawyers' *normal* fee will be recoverable from the defendant. Hence, far from imposing an unjustified cost on the defendant, the efficiencies which will result from the use of an opt-out collective mechanism should mean less legal cost, as compared with a multitude of individual claims.

Thirdly, the Government is concerned that contingency fees will create an incentive for lawyers to focus **only** on the largest cases. However, *not* allowing contingency fees (DBAs) in collective actions in the CAT—while allowing them in individual competition damages claims in the High Court (and presumably the CAT as well)—is likely to encourage lawyers to concentrate on the largest individual claims (e.g., by large direct purchasers from a cartel) and neglect meritorious indirect (consumer) damages claims. Nor is it obvious that a conditional fee agreement, with a success fee linked to the amount of work carried out, will incentivise lawyers to take on smaller classes: indeed there is a risk of some injustice to class members in such cases, as they will have to pay a success fee which is not liked to their recovery in any way (as a result of the Jackson costs reforms, and as implemented in s 43 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012). This amount may well be of a greater amount than a reasonable percentage contingency fee.

However, we recognise that there will need to be some control of contingency fee arrangements/DBAs in collective actions to protect the interests not only of defendants but also—and perhaps more importantly—of the represented claimants who do not actively participate in the case and who are not personally before the CAT. It follows that the CAT will need to be given the power to certify the reasonableness of the fees of the lawyers (and others) advising the class, before any distribution of a damages award to class members can be made. Clearly, in assessing reasonableness, the CAT will need to be able to take into account the way in which the case was conducted, the size of

the class, the difficulty of the claim, the risk the lawyers took on when agreeing the fee (with a higher percentage being justified for stand-alone as compared with follow-on actions), and also the amount of work actually carried out by the lawyers and others whose fees are being reviewed. In that regard, we again point to the draft court rules which were drafted in anticipation of the Financial Services Bill 2010 becoming law, which contained an opt-out class action regime for 'financial services claims' (see '*Draft Rules for Collective Proceedings*', available on the Civil Justice Council website, under 'European Consultations', 'Collective Redress'). In particular, the draft CPR 19.42 provided, in part, that:

> (1) An agreement in relation to the fees and disbursements payable by the class representative in respect of the collective proceedings must be in writing, and must (a) state the terms under which fees and disbursements are to be paid; (b) give an estimate of the expected fee, and state whether or not that fee is conditional on success in the collective proceedings, and (c) state the method by which payment is to be made, whether by lump sum or otherwise.
>
> (2) An agreement in respect of fees and disbursements payable by the class representative is not enforceable unless approved by the court.

We agree with the requirements contained in that draft rule, and would hope that similar requirements would be contained within any new CAT rules that may be implemented for a collective actions regime for competition law cases.

Finally, we would caution against requiring the CAT to engage in detailed costs assessment of the kind usual in High Court civil litigation at present, but some form of rigorous assessment of fee reasonableness in an opt-out class action is clearly required.

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 agree with the views expressed in the Consultation, that a panoply of possibilities for damages distribution should be 'on the table' for CAT's determination, on a case-by-case basis. No 'one size fits all', when there is an unclaimed fund resulting from undistributed damages. There are a number of **possible** destinations for unclaimed monies:

i. A *cy-près* distribution (whether by way of a distribution to a nominated 'as near as' organisation, or by price roll-back);

ii. Escheat of the unclaimed residue to the government/consolidated fund (for example where most of the victims of a cartel were public bodies);
iii. Reversion of the unclaimed fund to the defendant (if, in all the circumstances, its right to the money is superior against all but the injured class members);
iv. Contribution of the unclaimed amount to a public funding or access to justice scheme (such as the Access to Justice Foundation, as commented upon further in Q21 below); and
v. Claimant-sharing (whereby the unclaimed fund is shared amongst those class members who can be identified and who have already participated in the damages distribution).

Each option has relevant merits and demerits (explored more fully in Mulheron, '*Cy-Près* Damages Distributions in England: A New Era for Consumer Redress' (2009) 20 *European Business Law Review* 307).

On balance, we favour that **all** options be legislatively provided for (with the exception of option v, claimant-sharing, which we consider would give an unmeritorious windfall to those claimants who had already come forward to claim their compensation—one of the other destinations should be used instead). We consider that the court should be given the widest possible discretion with respect to the unclaimed monies, and that, on a particular fact scenario, one destination may appear preferable to the others. We further suggest that, although reversion to the defendant should be considered to be a wholly exceptional scenario, there may be the odd case in which reversion is the most apt destination (e.g., where a class has prevailed against a dominant undertaking, and where the specific abuse of dominance was novel, despite having harmed the class). In our view, it is ultimately a decision for the legislature, as to what possible destination/s may be available in competition law cases, in which aggregate assessment of damage has occurred—and, as stated, we consider that options i, ii, iii, and iv, should all be 'on the menu', as possible destinations of unclaimed damages.

We wish to make a few specific comments about the relative merits of paying any unclaimed sums to a single specified body, by means of an organisational *cy-près* order (rather than to one of the other possible destinations noted in the preceding paragraph) are outlined below. These are noted, but with the caveat that the preferable destination for unclaimed damages must **always** depend upon a case-by-case examination. In a particular case, a *cy-près* distribution may not be the preferable course. However, in an appropriate case, the merits of such an award are that:

- it seeks to ensure the prospect of some compensation and benefit to the class members via an indirect means, to a more certain extent than merely escheating the unclaimed residue to the State, or to some public fund for the general support of future litigation;

- while the other possible destinations listed above also represent low-cost remedial methods, in an age when court resources are increasingly stretched, a *cy-près* distribution to an organisation from which class members may indirectly benefit, may be more palatable to the victims of a cartel (and to the wider public) than the unclaimed monies reverting to the defendant, or going into Treasury's coffers, or going into a fund for future litigants;

- given that the doctrine of proportionality, in the conduct of litigation, is so firmly embedded within CAT's civil procedure, via the application of the overriding objective, *cy-près* distributions are directed towards the efficiency and finality of complex litigation, and with a 'proportionately beneficial' outcome for the class members who did not claim their refund;

- although it is often said that a *cy-près* distribution could result in two types of windfalls—one to the non-claiming class members who benefited from the *cy-près* distribution but who were not harmed by the defendant's behaviour; and the other windfall to class members who obtained both direct distribution of damages to them, and then a further benefit from the *cy-près* distribution. However, in rebuttal, we make two points. First, by ensuring a close overlap of class members and the *cy-près* beneficiaries (one of the key design points of a feasible and successful *cy-près* regime), the potential for windfalls to non-claimants is reduced. Secondly, if there is a prospect of 'double-dipping' by a claimant, via both direct and indirect distributions, then we believe that is preferable to the alternative of the 'second dip' reverting to the culpable defendant's pocket instead;

- It is also often said that the purpose of a *cy-près* distribution is to punish, and not to compensate. However, in rebuttal, we make two points. First, in a well-designed *cy-près* distribution, there will be close overlap between *cy-près* and original litigation classes, and hence, a compensatory element **will** be clearly present. Secondly, there is a legitimate deterrent element to collective actions, in that whilst deterrence is not a principal objective of such litigation, it is a by-product, and rightly so. We note that the Consultation also recognises and endorses the deterrent effect of collective redress (as discussed in Q10 above).

Finally, we suggest that, for any *cy-près* distribution ordered by the CAT, the following 7-step framework should be considered, so as to ensure that a *cy-près* distribution is indeed appropriate and fair:

i. A monetary fund must be initially created, by means of an aggregate assessment of damages (and **not** by means of any order which, as a matter of substantive law, could not be made, such as awards for restitutionary or exemplary damages);

ii. The *cy-près* distribution should only apply to the *unclaimed* amount. In other words, a *cy-près* order should never be made, so as to apply to the whole of the damages fund. The principal objective of the collective action is to compensate, and class members ought to be provided with a reasonable time (say, 3–6 months) in which to come forward to personally claim their amount of refund;

iii. The circumstances which trigger a *cy-près* distribution should be restrictively interpreted (e.g., where it is confidently predicted that a number of consumers or class members will not come forward to claim their compensation; or that the composition of the class has fluctuated constantly over the infringement period; or where the identities of many of the class members during the infringement period are not, and will not be, known for the purposes of damages distribution; or where the recovery per class member would be low, such that arranging the payment of damages to individuals who did not proactively come forward to claim their monies would generate administrative costs which would match, or exceed, the damages per class member);

iv. A *cy-près* distribution to an organisation 'as near as' is often preferable to a price roll-back *cy-près* distribution, but both should be 'on the table' for consideration in any given case;

v. There must be a sufficiently close overlap between the original litigant class and the substituted *cy-près* class, so as to reduce the prospect of windfalls to uninjured parties. The sorts of factors that will impact on this question will include:

- whether the *cy-près* recipient promotes the sorts of activities/interests/aims that the class members were pursuing, and which linked the class members in bringing the litigation;
- whether the *cy-près* recipient benefits the same geographical community as where the original class members lived/worked;
- whether the *cy-près* recipient promotes improvement in the type of anti-competitive practices that the class members suffered from, and which provided the common link between the class members in bringing the litigation;
- whether the *cy-près* recipient seeks to care for the same type of class members as those who suffered loss, but with a particular emphasis upon those financially worse off, or those who were less privileged than the actual class members who suffered the overcharge;

vi. The CAT would need to decide whether it was prepared to make a *cy-près* distribution on the basis of 'as near as possible' to the underlying purposes of the litigation, or on the basis of the 'next best class'. Hopefully, these would usually coincide. But they may not always (e.g., a school for disabled children may be in dire need of funding to prevent its closure, and hence, it could be seen as the 'next best class', but its functions and activities bear no relationship to the price-fixing of copper wiring, say, and hence, it is not 'as near as possible'). Relevant jurisprudence in Canada and the United States shows that this is a real philosophical dilemma in the application of *cy-près*, upon which reasonable judicial opinion has differed. Some courts have adopted a broad-brush approach that permits unclaimed damages to be sent to a worthy charitable purpose, whilst in other cases, a stricter view has been adopted, that the *cy-près* recipient must relate, as nearly as possible, to the original purpose of the class action. There are policy arguments favouring each type of distribution (which space restraints preclude our discussing in any detail here—however, the point is explored more fully in Mulheron, '*Cy-Près* Damages Distributions in England: A New Era for Consumer Redress' (2009) 20 *European Business Law Review* 307, 335–37);

vii. Finally, we suggest that the CAT may not necessarily wish to be involved in selecting *cy-près* beneficiaries, but may prefer to leave the selection and/or monitoring of the *cy-près* beneficiaries to the English Charity Commission, who are well-equipped and well-resourced to conduct that task. Given that a *cy-près* distribution is not an adversarial proceeding (the defendant's liability having already been determined and then assessed on either an individual or aggregate basis), then the Charity Commission would be able to establish a *cy-près* scheme, unfettered by contested collective action proceedings. We make this suggestion because of an observation sometimes made in North American class actions jurisprudence, that 'On one hand, [courts] don't like interfering with bargains reached by defendants and class members. On the other, they need to be vigilant about not merely rubber-stamping lawyers' [or their own] favourite charities' (per J Kleefeld, 'Book Review: *The Modern Cy-Près Doctrine: Applications and Implications*' 92007) 4 Canadian Class Action Rev 203, 209. If the Charity Commission were minded to undertake the task of choosing the relevant *cy-près* beneficiaries, then we think that the Access to Justice Foundation should be one of the potential beneficiaries to which the Commission should have regard, in any given case.

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

We do **not** consider that the Access to Justice Foundation, set up under s 194 of the Legal Services Act 2007, would **always** be the most appropriate recipient of unclaimed damages—nor, indeed, that it should be the default, or presumed, choice of destination. Instead, we consider that it will be for the CAT to consider a range of submissions as to the most appropriate destination for the unclaimed monies, from among the panoply of possible destinations provided by the Legislature.

If, along the principles which have been outlined in the *cy-près* framework outlined in Q20 above, there is a closely-linked organisation, whose recipients of services closely match the original litigant class, then we consider that such an organisation would be the most preferable beneficiary, in the circumstances. However, if there is no, or no clearly appropriate, *cy-près* beneficiary; and if reversion or escheat seem unpalatable to the court, then we think that the Access to Justice Foundation will be the preferred destination in many cases.

Our concerns about the Access to Justice Foundation being the default option are two-fold: (1) there may be accusations (as have been raised elsewhere, whenever a public fund is the beneficiary of class actions damages) that 'class litigation is primarily being used to fund future litigation'; and (2) there may be some very considerable sums of money requiring a 'home', and if a *cy-près* beneficiary was clearly available in the case at hand, then it may be difficult to avoid the sum from going to the Access to Justice Foundation in any event.

However, and to reiterate, we certainly think that the Access to Justice Foundation should be **one** of the panoply of possible destinations for unclaimed aggregate damages, and that, in many cases, it will be the most appropriate and deserving of possible recipients, because its objectives match the meritorious and primary objective of opt-out class actions, *viz*, facilitating access to justice.

Q22. Do you agree that the ability to bring opt-out collective actions for breaches of competition law should be granted to private bodies, rather than granting it solely to the competition authority?

If the Government's policy aim of allowing claimants greater access to redress is to be achieved, it follows that only allowing collective actions to be brought by the competition authority (without any increase in resource available to it to do so), will not materially increase the overall availability of

redress. It is also likely to reduce the deterrent effect of the competition regime overall as resources are diverted away from public enforcement.

More generally, only allowing public bodies to bring representative claims will prevent many claimants from exercising their own right as best they see fit: they should be able to group together to assert their common rights themselves. In other words, we strongly support the notion that collective actions for breaches of competition law should be capable of being brought by a representative which is any of the following:

- a directly-affected claimant (who has allegedly suffered loss as a result of a competition law infringement);
- an 'ideological claimant', who satisfies the requirements of an 'adequate representative', as set out in the relevant CAT rules;
- any 'ideological claimant' who is specified under a legislative instrument as being an appropriate body to bring such a claim; or
- the competition authority.

Q23. If the ability to bring collective actions were granted to private bodies, do you agree that it should be restricted only to those who have suffered harm, or would there also be merit in allowing firms and/or third party funders to bring cases?

We agree with the Government's preliminary view that law firms and litigation funders should not be allowed to bring collective actions as representative parties if they have not suffered harm or are not otherwise genuinely representative of the class whose interests are being protected by the action.

There is a clear risk of the 'principal/agent' problem arising, where claims could be run solely with a view to the profit of the lawyers/funders, without sufficient regard to the interests of the class (from whose representative they would not be obliged to take instructions—for example on a settlement offer). Controlling for the risk of such excesses may, we believe, place a considerable burden on the CAT.

However, we also endorse the comments of the working group which prepared the draft court rules which were drafted in anticipation of the Financial Services Bill 2010 becoming law (see '*Draft Rules for Collective Proceedings*', available on the Civil Justice Council website, under 'European

Consultations', 'Collective Redress'). The Explanatory Notes accompanying those draft rules provided as follows (at pp 8–9):

> There was concern expressed by some members of the group that the class representative should not be a law firm or a body created specifically for the purpose of acting as a class representative ... The working group therefore spent a considerable time looking at more specific hurdles—such as that the representative was a body whose objects were linked to the subject matter of the proceedings; or that the representative was not a special purpose vehicle (SPV) created solely for the purpose of bringing the proceedings.
>
> This approach was, however, rejected for two reasons. First, it was decided that whatever formulation was used, the representative would always be able to find a way of getting round the criteria. Secondly, any chosen formulation was likely to be open to different interpretations and would therefore give rise to litigation over its meaning.
>
> The working group did not want to draft a rule which could be avoided by manipulation and would give rise to satellite litigation, when the real issue before the court was whether the proposed representative was an 'appropriate' person. In a particular case, if it is not appropriate for a SPV or law firm to act as the class representative, then the court will not permit it to do so. However, where a law firm or SPV meets the other criteria laid down in rule 19.21, then the court may consider it appropriate to act.

We endorse these views to the Government, in relation to the proposed collective actions regime proposed for the CAT's jurisdiction.

ENCOURAGING ALTERNATIVE DISPUTE RESOLUTION

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

We believe that the usual methods for *encouraging* ADR in civil damages claims already in use in the High Court (notably through the use of pre-action protocols backed by costs sanctions) should be sufficient for all forms of claim brought in the CAT.

This is subject to the possible exception of those claims on the proposed fast track, where we believe that a mandatory attempt at good faith mediation may prove to be a good way of managing simpler cases of this kind (see our response to Q6).

Even though our general view is that mandatory ADR is not desirable for claims brought in the CAT, we endorse the view of the Working Group which prepared the '*Draft Rules for Collective Proceedings*', available on the Civil Justice Council website, under 'European Consultations', 'Collective Redress'), that, although mandatory ADR should **not** be a condition for the certification of a collective action, it can be encouraged by the careful drafting of the relevant CAT rules. In that regard, the Explanatory Notes accompanying those draft rules provided as follows (at pp 8–9):

> the working group very much recognised the importance of encouraging ADR, and the draft rules cater for it in three different ways:
>
> - First, in its application for a collective proceedings order, the applicant must state, verified by a statement of truth, whether or not ADR has been used (CPR 19.18(3)(b));
> - Secondly, at the first case management conference, the court will consider staying the proceedings for ADR (CPR 19.18(5));
> - Thirdly, whether ADR has been attempted will be one of the circumstances that the court considers in deciding whether collective proceedings are appropriate (CPR 19.20(2)(c)).

Any or all of these may wish to be adopted by the CAT in its rules governing the conduct of collective actions for competition law claims.

Q25. Should a pre-action protocol be introduced for (a) the proposed new fast track regime, (b) collective actions and/or (c) all cases in the CAT?

We suggest that a specific protocol for competition claims (or competition claims in the CAT) may be premature—especially as regards damages claims—given the relative novelty of this kind of action until now. We also note that many types of complex litigation proceed satisfactorily without a specific pre-action protocol (e.g., intellectual property, shipping, or company law disputes), relying instead on the general principles and guidance laid down in the general Practice Direction – Pre-Action Conduct. Hence, we suggest that, apart from the limited procedural requirements in 'Practice Direction—Competition Law—Claims relating to the application of Articles 81 and 82 of the EC Treaty [*sic*] and Chapters I and II of part I of the Competition Act 1998', a further set of pre-action requirements is likely to be superfluous.

Furthermore, the CAT's *Guide to Proceedings* (Oct 2005) provides a useful supplement to the CAT Rules and, in practice, serves as an informal set of practice directions. We therefore suggest that, to the extent that pre-action guidance is needed for private claimants in competition damages (or injunctive) claims before the CAT, it can be provided there. We suggest that guidance on the procedures to be followed in opt-out collective claims could also be provided by the CAT building on 'best practice' from other comparable jurisdictions.

Finally, we note that the main sanction for failing to follow pre-action protocols, in those areas where specific protocols have been made, is in costs. Since the CAT costs regime is flexible—as the CAT Rules (r 53(2)) make clear, the CAT has a full discretion as to costs and is not bound by the 'loser pays' rule—we suggest that the CAT already has the power to sanction unreasonable pre-action behaviour by a party where that has affected the conduct of a case before it ('the conduct of ... parties *in relation to* the proceedings', emphasis added). However, it may be useful to make this power clearer when the CAT Rules are revised.

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

We believe that there will necessarily need to be some amendment to the CAT Rules (and to the *CAT Guide to Proceedings*)—and possibly also incorporation within primary legislation—to deal with settlement offers in the context of an opt-out collective action. We base this viewpoint on three reasons.

First, and most importantly, the rules (and probably primary legislation) will need to provide that no settlement of an opt-out class action can become final unless approved by order of the CAT. This may happen either at the first case management conference (if the putative class and the defendants have been able to agree a preliminary settlement and acceptable class definition), or at a later stage of the proceedings where such an agreement is reached with the class (e.g., as often happens in other jurisdictions which have a class action procedure, shortly after the scope of the class has been certified). The matters which we believe should be considered by the CAT before making the order requested are discussed further at Q28 below.

Secondly, the rules will need to provide the CAT with the power to manage the collection and distribution of the settlement amount to the class. Of course, in the majority of cases, this will be carried out by, or on behalf of, the representative claimant/s. However, we suggest that it will be important for the CAT to be able to give directions (for example) as to how the existence of the settlement is advertised to the class, how long the class members will have to accept the settlement

offer before the class is closed, and the proof-of-claim required of class members to support their acceptance of the settlement (if these cannot be agreed on fair terms between the class representative and the defendant/s). We comment further on the need for the CAT to have adequate powers to manage the distribution of class awards below.

The CAT should also be given the power to appoint a trustee to carry out this work if, for any reason, it considers that the class representative will not be a suitable person (e.g., because its own interest in the class settlement fund is so large that there will be a perception of a conflict of interest between the representative and the remaining members of the class).

Thirdly, the CAT will need to have the power—again likely in primary legislation—to make orders in relation to the distribution of any unclaimed residue of the settlement, whether by a *cy-près* distribution or otherwise. We do not think it is appropriate for the parties to be able to decide autonomously as to what the destination of the unclaimed part of a settlement fund might be. (We have commented further on this issue at Q20 and Q21 above.)

Q27. The Government would be interested in hearing whether, should the reforms in this consultation be carried out, your organisation would intend to establish any initiatives that might facilitate the provision of ADR for disputes relating to competition law.

We have no comment on this question.

Q28. 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?

We agree that, if the proposals to allow competition opt-out class actions for competition damages claims are to be introduced, it will be necessary for the regime to allow effective settlement by the class of all of its claims against each cartel member after proceedings had been commenced.

Timing: We suggest that the CAT should be empowered expressly to consider the question of settlement of the action, if both the proposed representative claimant(s) and the defendant(s) request it. This joint request could be made at <u>any</u> time—even at the same time that the CAT is formally seised of the class claim. In particular, we believe that the same considerations which inform whether the settlement is fair, just and reasonable, should apply to those settlements which have been reached

before the formal commencement of proceedings (e.g., a settlement reached during ADR procedures), and at, or after, a contested certification hearing.

In particular, we consider that any collective actions regime proposed for the CAT rules must be flexible enough to cater for a 'certification for the purposes of settlement' model. Clearly, these types of settlements are customary in North American competition law-based class actions, and similarly, we consider that the arrangement should be permitted under the CAT regime. Such a certified settlement has real advantages to a defendant, because it gives defendants the chance to participate in framing the class description as widely as possible; few class members ever opt out and that means that the wider class members are then barred from suing the defendant/s again in respect of the same cartel, because the certification describes the class bound and provides who gets notice of the settlement (thereby assuring due process).

Such a certified settlement could occur as early as the first case management hearing (or, at least, the CAT could put the matter down for a certification hearing, upon being told that that was what the parties intended).

In fact, a request for 'certification for the purposes of settlement' would be very similar to the Dutch Mass Settlements Act (WCAM). This was an opt-out regime for settlement agreements for 'mass disaster accidents' which was implemented in July 2005, and under which a joint request must be made to the Court of Appeal in Amsterdam by a representative organisation which acts on behalf of the parties affected, and by the defendant/s that will pay the damages, upon whom the court may declare a settlement binding, where the payment of compensation is for 'damage caused by an event or similar events'. However, instead of being a 'settlement only' model, and incapable of managing anything else (as per the Dutch model), we envisage that the model proposed for the CAT's opt-out collective action for competition law would be a model that permitted 'certification for the purposes of settlement', as a 'built-in' option within an opt-out litigation/settlement model. Such a model is, in our view, an <u>essential</u> part of any reformed regime. Defendants may want to settle early on, as widely as possible, and without any prospect of a trial, and the system should facilitate that.

Matters to be considered: Regardless of when a settlement is reached in the matter, we believe that the interests of absent class members, and the complexity of price-fixing and market-sharing arrangements, require that the CAT be satisfied that any settlement reached is 'fair, just and reasonable'; that the settlement properly deals with all of the claims against the infringers; and that the settlement procedure is flexible enough to allow the fairness issues to be dealt with in an effective and efficient manner.

We consider that the following nine factors to be assessed in deciding whether a settlement amount reached in a US class action was 'fair, just and reasonable', derived from *Re General Motors Corp Pick-Up Truck Fuel tank Prods Liab Litig*, 55 F 3d 768, 785 (3rd Cir 1995), have much to commend them, as a 'starting point' for assessing whether the settlement amount is proper—albeit that the list should **not** be treated by the CAT as a check-list for every case:

- the complexity, expense and likely duration of the litigation;
- the (likely) reaction of the class to the settlement;
- the stage of the proceedings and the amount of disclosure completed;
- the risks/likelihood of establishing liability against the cartelists (in stand-alone cases);
- the risks of establishing loss on the class members' part;
- the risks (and costs) of maintaining the collective action through to the trial;
- the ability of the defendants to withstand a greater judgment than the settlement amount;
- the reasonableness of the settlement fund, in light of the best possible recovery in litigation;
- the reasonableness of the settlement fund to a likely recovery, in light of all the attendant risks of litigation.

In addition, ensuring fairness will, we suggest, require the CAT to decide that any settlement with a class is fair both to defendants and to *all* class members. It will, we suggest, therefore need to consider three related, but separate, questions (preferably in a public 'fairness hearing'):

- Is the class properly formed? That is, is the definition of the class appropriate (neither too wide nor too narrow) to allow a fair resolution of all class claims?
- Are the certification criteria satisfied (with the exception of the superiority criterion, which may be treated as less weighty than the other criteria, in the context of a proposed settlement, as discussed in Q15 above)? For example, is the representative claimant properly representative of the class? Is use of the class mechanism in the interests of justice?
- Are the 'mechanics' of settlement sound and fair? For example, are the costs claimed by the legal representatives fair and reasonable? Are the arrangements for distributing the class settlement fund robust and economical?

The options for CAT, where a settlement approval is requested: We suggest that the CAT might sensibly be given three options as to its order, if such a request for approval of a settlement is made:

- First, the CAT may reject the settlement proposal entirely, on the basis of any of the matters dealt with above;

- Secondly, the CAT may accept the settlement proposal entirely, and give direction as to how the settlement fund should be advertised and distributed—and the time and manner by which those not wishing to be bound by the order (the 'objectors') can opt-out;

- Thirdly, the CAT may make a provisional order of rejection or acceptance which would become final, unless any objectors within the proposed class definition (or possibly any of the co-defendants where the infringement was carried out jointly, as will be the case for a cartel action) bring a reasoned objection to it within a short time (e.g., 14 days). If a reasoned objection is made, the CAT will then be able to consider it before confirming (or not) its class settlement order.

Q29. Should the competition authorities be given a power to order a company found guilty of an infringement of competition law to implement a redress scheme or to certify such a voluntary redress scheme?

We suggest that the issue of the power to require a redress scheme to be offered, and the question of certification of such a scheme, are two distinct issues, and need to be treated separately.

We agree that the OFT should be given a power to require a company to offer a redress scheme in appropriate cases—typically in those cases where a cartel has substantially affected individual end-consumers (such as the alleged cartel in the dairy sector in the UK—allegations which were later dropped by the OFT, per: *Press Release 46/10*, 'OFT drops a number of allegations against Tesco in Dairy investigation and agrees discount for Tesco not contesting remaining aspects' (30 April 2010)). For such cases, where the loss per unit is very small (a matter of pence per litre of milk) but the overall damage to consumers (and hence to the public interest) is large, ordering a redress scheme would be an appropriate response, in addition to any fining decision.

For such claims, even an opt-out class action is unlikely to be an efficient means of redress, given that identifying the exact level of purchases of claimants will be extremely difficult, and the motivation of each individual consumer to come forward to claim its share of a fund would be very weak.

It follows that a redress order ought to enable the OFT to require infringers to make redress not only by offering money compensation but also, in appropriate cases, by offering better terms to their customers. So, in the case of the milk allegations, a redress scheme ought to be able to require a

'roll-back' *cy-près* remedy—money off future sales (of milk in our hypothesis)—possibly in the form of vouchers redeemable in all outlets. We accept that roll-back remedies have been criticised, in that they may be seen as allowing cartelists to retain the customer through the roll-back offer, and as giving the cartelist an advantage over its competitors (because the cartelist's goods or services will be priced lower during the period of the roll-back). No doubt this is an issue to which the OFT would be 'alive'. However, we suggest that the availability of such a scheme is better than no redress for consumers at all. In order to ensure that the terms of the scheme are complied with (i.e., that the roll-out remedy is indeed distributed, and is equivalent to the amount of harm caused by the infringement), the OFT should have the power to require the infringer to put in place an independent monitoring trustee—in much the same way as is done to monitor compliance with behavioural undertakings in the merger control field.

We suggest that infringers ought to be given the opportunity to offer redress schemes voluntarily before they are imposed: many companies will, we believe, wish to be seen to make good the harm caused to restore their reputations and will wish to avoid an *order* if at all possible. This will particularly be true where an undertaking applies for immunity or seeks to settle a public enforcement proceeding. Indeed, the OFT may wish to consider whether it might, as a matter of policy, require such undertakings to offer a redress scheme in any event—so that they can, in one set of proceedings, address and cure all of the consequences of the harm they have caused through breaching competition law.

However, we would caution against requiring (or even permitting) the OFT to *certify* voluntary redress schemes for two reasons:

- First, it will take valuable and scarce public resource away from the OFT's principal competition function—detecting competition infringements and enforcing the law against them. If redress schemes are imposed on infringers and then certified as reasonable (fair), the infringers will appeal that finding either in addition to or, equally likely given the amounts involved, separately from, any administrative fines imposed under the OFT's public enforcement powers; and

- Secondly, any perception of unfairness in the amount of redress offered to victims of the infringement would likely cause reputational damage to the OFT which would be difficult for it to mitigate. This would be particularly true, given that the victims will be unable to challenge the OFT's decision.

Instead we suggest that, where an infringer or a victim is unhappy with the content of a redress scheme (imposed or voluntary), they should be able to apply to the CAT to have the scheme assessed in the same way as a pre-action settlement of a class action (see our response to Q28). This would allow those aggrieved by a redress scheme to make their points to a judicial body *without* using OFT resources or directly engaging the OFT in questions of reasonableness of compensation (albeit that the OFT would be able to intervene in proceedings if it took the view that there were important issues at stake).

Q30. Should the extent to which a company has made redress be taken into account by the competition authorities when determining what level of fine to impose?

Starting from the basis that damages are (primarily) to compensate, and penalties levied by the OFT are (primarily) to deter, we agree with the Government's first conclusion, which is that reducing the fine by an amount equivalent to the compensation paid is not appropriate. **Both** kinds of payment are necessary in a properly functioning system.

We suggest that most companies who will wish to make voluntary redress, will do so for reputational rather than purely money motives, although the latter may well play a role (in particular, to seek to avoid expensive protracted litigation). So, although in some cases the prospect of a reduction in fine for mitigation might encourage companies to offer redress, in practice we suspect that this effect is likely to be small. We are therefore agnostic on the issue of whether infringers who make redress voluntarily should be able to benefit from a further reduction in fines for doing so.

As a practical matter, we are not clear as to what would happen if an infringer successfully challenged the decision pursuant to which the redress scheme was made. By that time, the infringer's customers etc. will no doubt have claimed against the fund set up to compensate them: would they be required to repay money they have received?

However, we believe that there may be benefit in requiring certain infringers to offer a redress scheme—particularly where they wish to settle a public enforcement proceeding (and thus benefit from a reduction for this) and possibly for immunity applicants as well (although here the arguments are more finely balanced, as making an offer of redress an immunity requirement may deter potential leniency applicants). In these cases, the infringers are unlikely to appeal the basis of the findings against them, and so the practical concern we have outlined above should not, in practice, occur.

COMPLEMENTING THE PUBLIC ENFORCEMENT REGIME

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

We believe that a fair and efficient, properly designed collective redress mechanism—using an opt-out model—as well as increasing access to the CAT for consumers and for SMEs, will inevitably increase the public benefit of the overall competition regime. There are two broad reasons for this. First, the reputation of the competition system will be enhanced by increased participation by the public; and secondly, the greater amounts paid in redress will have an increased deterrent effect, reducing the impact of anti-competitive behaviour on the economy.

In our view, the continued absence of effective access to redress—for both consumers and for SMEs—means that the relevance of the UK competition regime to the public is diminished: there is a risk that it is seen as an esoteric policy area which is only of concern to large corporations, government bodies, academics and practising lawyers. Enabling consumers and SMEs to participate in competition enforcement more immediately—even through representatives—will increase awareness and appreciation of the effects of anti-competitive behaviour on consumer prices. Moreover, it does not enhance the public's confidence in the law, if account is taken of the current situation, canvassed earlier in Q9. In light of this grim landscape, we hope that the government's proposals will mean that the effectiveness of UK competition redress can (at least) match that available in other advanced economies.

Ensuring that a collective redress system is both well-known and seen to be fair, will be very important in engaging the public more closely with competition policy. The CAT will need to ensure that its processes are not only fair, but are well-publicised and open. Indeed we suggest that the Government may wish to consider giving both the CAT and the OFT a power or even a duty to promote fair and effective competition redress and to ensure that the successes of the competition regime (and not just the public enforcement activities within it) are widely appreciated.

As the Consultation recognises, an increase in damages awards in particular—despite their mainly compensatory nature—will have an additional deterrent effect on undertakings contemplating engaging in unlawful anti-competitive behaviour. When combined with OFT fines, and the increased possibility of detection through an increasingly effective leniency programme, the potential cost of such activity, as compared with the gains, will increase substantially.

Q32. Do you agree that some leniency documents should be protected from disclosure and if so, what documents do you believe should be protected?

We suggest that the issue of whether 'leniency documents' should be disclosed depends on two matters, *viz*, what their contents might be and when the disclosure is sought:

- documents which are in existence before the leniency application is made should be disclosable, according to the normal rules for disclosure (see Q12 for our views on disclosure in the CAT), subject only to the timing of disclosure not obstructing any ongoing public enforcement activity;

- documents which are produced solely for the purposes of the leniency application ('leniency documents') should be protected, at least until any decision, which is prompted by the leniency application, becomes final. We do not have a strong view on whether that protection should continue after that time, although we suggest that the CAT should have discretion to order disclosure in exceptional circumstances (see below).

In any event, we suggest that the importance of disclosure of leniency documents (narrowly defined) may be overstated, for the following reasons:

- in cartel cases, the infringement is by object—so that the OFT does not need to demonstrate an effect when investigating using public law powers —while the *effect* of any infringement is the main dispute in a claim for civil damages. Hence, the contents of leniency statements (provided they are accurately summarised in the subsequent decision) are unlikely to be of particular relevance to a damages action;

- in any event, much of the content of any leniency statement will eventually—and again, only to the extent to which they are relevant to the civil proceedings—become available by way of witness evidence in the damages action, and the makers of the statement will be open to cross-examination as to what occurred (again to the extent not disclosed in the decision itself).

Since disclosure is not automatic in the CAT, it should be open to the CAT to decide, on a case-by-case basis, whether disclosure of documents produced in the context of a leniency application is necessary and proportionate for the purposes of each individual claim. We suspect that such

discretion—coupled with a presumption of non-disclosure of leniency documents—probably strikes the correct balance between the various competing public and private interests.

We also suggest that there may be two policy reasons for not legislating at a UK level on this issue at present:

- First, the law on such disclosure has recently been clarified by the European Court of Justice in *Pfleiderer*[2011] 5 CMLR 219 (ECJ, 14 June 2011),as recently applied by the High Court in *National Grid Electricity Commission plc v ABB Ltd* [2012] EWHC 869 (Ch). It is clear from this case law that the national courts will be very careful in disclosing leniency documents produced in the context of a European Commission investigation, even though they now clearly have the power to do so; and

- Secondly, we understand that the European Commission is contemplating legislating to clarify (and possibly change) the disclosure rules as set out by the European Court of Justice in *Pfleiderer*. We suggest that, given the need to ensure consistency with the EU disclosure rules—as that the majority of claims in UK courts follow on from European Commission decisions—domestic legislation in this area might currently be superfluous.

Q33. Do you agree that whistleblowers should be protected from joint and several liability and to what degree, if at all, do you think this should be extended to other leniency recipients?

The question of the joint and several liability of cartelist for all of the loss caused by the cartel has not, as yet, been fully tested by the courts in England (nor, as far as we are aware, elsewhere in the EU).Where cartels cause effects across more than one EU Member State, the position is complicated by the possibility of actions being brought against different cartel members in different *fora*. This means that a rule which is valid in England, giving 'single' liability only to a whistleblower, is likely to be of very limited practical effect, given that a claim for contribution (or equivalent) might be brought against that whistleblower elsewhere in the EU.

As the Consultation recognises, there is some risk of injustice to claimants if a solvent defendant is excluded from joint and several liability, and the remaining defendants are either difficult to sue (for example, because they are mainly based outside the EU), or are no longer trading solvently.

That said, for a potential whistleblower, the benefits of only having 'single' liability for the losses caused by it to its own customers (direct or indirect) can be considerable. Where the whistleblower participated in the cartel unwillingly, and is one of the smaller cartelists, escaping from joint and several liability for the damage caused by larger, more culpable, co-cartelists will be of very significant benefit. In our view, this would undoubtedly encourage smaller whistleblowers to come forward.

Given the uncertainty of the current legal background, and the conflicting interests which should be protected, we suggest that detailed legislation, which would always give a whistleblower protection against joint and several liability in a follow-on civil damages claim, might have undesirable consequences. Instead we suggest that the following measures be considered:

- that the CAT should be given the discretion, at the application of a defendant, to declare that, for the purposes of English (or Scottish) law claims (as the case may be), an award of damages, following the trial of a class action in England (or the certification of a class settlement) is sufficient to compensate the victims of that defendant's unlawful cartel activity and that, accordingly, all other claims against the defendant in relation to that cartel (including contribution, and similar claims from co-cartelists) are extinguished;

- that the CAT should be able to take account of **both** the adequacy of the settlement (or award) and the conduct by the applicant/defendant of the case before the CAT, and also of its conduct in the prior public enforcement proceedings leading to the decision on which the damages claim is based;

- on this basis, there should be a strong presumption that a whistleblower application to have the joint and several liability extinguished would be granted, unless it were clearly contrary to the interests of justice for that to occur;

- other defendants should also be able to make a similar application, but without the strong presumption that it would succeed. The CAT should take an overall view of their conduct of case (both public and private), as well as of the timing and adequacy of the damages agreed or payable, before making such an order.

Q34. The government seeks your views on whether there are measures other than protecting leniency documents or removing joint and several liability, where action should be taken to protect the public enforcement regime.

We have no comment on this question.

ANCILLARY MATTERS WORTHY OF MENTION

Finally, we wish to point to certain other relevant points, which are not covered elsewhere in the Consultation or in the responses above, but which we consider to be vital to the proper and workable operation of an opt-out collective actions in the CAT:

The legal treatment of foreign class members. We firmly believe that the best option to adopt, in respect of class members who are not domiciled in England and Wales, but who seek to join a collective action commenced in the CAT, is to require that these foreign class members **opt in** to the class proceedings.

In that respect, we strongly concur with the view of the Working Group which drafted the *Draft Court Rules for Collective Proceedings* (published 2 February 2010), wherein it was stated in the covering Explanatory Notes (at p 11, under the heading, 'Non-Domiciled Class Members'), that the rules:

> were intended to avoid any arguments in relation to national sovereignty which might arise if the provisions purported to assert jurisdiction to decide cases for foreign domiciliaries who have taken no active part in the proceedings.

Both the Financial Services Bill 2010, and the court rules underpinning it, were drafted consistently in their legal treatment of foreign class members: foreign class members would have to proactively opt in to the English class action.

We believe that this is the correct, and proper, course to adopt, for in those foreign jurisdictions which adopt the 'Dicey Rule 36 test'—requiring that a court can only assume jurisdiction over a party on the basis of: (1) presence in the jurisdiction, (2) prior consent to be bound by the jurisdiction of the court, or (3) a voluntary submission to the jurisdiction of the court—it would be

inconceivable that a foreign court would recognise an English class action judgment or settlement, which purported to bind a foreign class member, unless that foreign class member had opted in (or taken some other active step to voluntarily submit to the jurisdiction of the English court). (This topic is discussed, in further detail, in: Mulheron, 'The Recognition, and *Res Judicata* Effect, of a United States Class Actions Judgment in England: A Rebuttal of *Vivendi*' (2012) 75 *Modern Law Review* 180; and in Mulheron, 'In Defence of the Requirement for Foreign Class Members to Opt In to an English Class Action' in E Lien and D Fairgrieve (eds), *Extraterritoriality and Collective Redress* (OUP, 2012, forthcoming)).

Conflict between class actions and arbitration clauses. In North American jurisdictions, disputes have arisen, where a consumer contract provided for arbitration, and contained a further clause banning the participation of the consumer in a class action, but where the representative claimant nevertheless applied for the certification of a class action, arguing that the arbitration clause was abusive and invalid. This is a potentially difficult issue, especially if the arbitration clause is held to be valid, but the certification criteria for a class action are also met. Some legislative provision on this issue may be called for, to accord priority to one form of dispute resolution or the other, in the specific context of competition law collective actions.

Potential abuse of process issues. We consider that either the CAT judges, or the rules-drafters, may have to deal with issues such as: whether (and, if so, to what extent) the *Henderson* rule applies to collective actions (and whether the representative claimant can justifiably hold back part of his case until a 'rainy day'); the extent of communication permitted between defendant and class members; and how parallel class actions against the defendant/s should be handled.

Settlement of the collective action. Given that most collective actions settle (in that respect, they are no different to unitary actions), the fairness criteria which apply at the fairness/settlement hearing will be crucial (the body of jurisprudence from other opt-out jurisdictions as to the sorts of matters which may be relevant in this determination has been briefly mentioned in Q28 above). Also, the procedures by which class members can object to a settlement, or opt out of a settlement, need to be judicially or legislatively prescribed. Additionally, the procedure (if any) by which absent class members who have already opted out of previous settlements in the same class action can opt back into a class, for the purposes of a subsequent settlement, need to also be judicially or legislatively prescribed.

Assessing and distributing the money. We would particularly suggest that the CAT rules, or the governing legislation, expressly provide for matters surrounding the assessment and distribution of compensation to class members, whether by settlement (which will be the more common course) or following judgment, should the class prevail at trial. Secondary only to certification, the process of

assessing, claiming and distributing monetary relief (should the class's claim succeed or settle) will be the most important stage of the collective action. Some of the issues are extremely controversial, and careful thought will be needed, as to which direction the CAT will want to pursue, e.g., what pre-requisites for aggregate assessment will be prescribed? Will an average or *pro rata* assessment of damages per class member ever be countenanced? What methods of proving individual issues (such as additional quantum of loss) will be acceptable, after the common issues are decided/settled? Will compensation 'in like' ever be permitted (e.g., coupon recovery), or will that be precluded? Will reversionary distribution to the defendant cartelist be permissible (see above)? Will a compensatory order to the representative claimant, for time and effort expended to represent the absent class members, be permissible?

These, and other design issues, are referred to in: Mulheron, 'Building Blocks and Design Points for an Opt-Out Class Action' [2008] *Journal of Personal Injury Law* 308 (outlining 60 points to consider in class actions design, whether legislatively or judicially-determined). In addition, a number of possible 'best practice' solutions regarding a majority of the 60 design points, on the basis of comparative jurisprudential study of the regimes operative in Australia, Canada and the United States, are canvassed in Mulheron, *The Class Action in Common Law Legal Systems: A Comparative Perspective* (Hart Publishing, 2004, Pts 2 and 3). The authors of this Response would be happy to expand further upon any of these design points, and the drafting options thereunder, if desired.

Finally, we would note that several of the 'design features' of an opt-out collective action for competition law claims will require to be implemented by statute, rather than by court rule (e.g., the tolling of limitation periods for the represented class members; the modification of *res judicata* which an adjudication on the common issues entails). For further discussion of this point, please see, e.g.: Mulheron, 'Implementing an Opt-Out Collective Action for England and Wales: Legislation versus Court Rules', in CJC, *Improving Access to Justice Through Collective Actions: Developing a More Efficient and Effective Procedure for Collective Actions: Final Report* (Nov 2008), App N, p 413.

CONCLUSION

We welcome the Government's initiative in bringing forth this wide-ranging and important Consultation, and we trust that the comments above will be relevant and of utility to the ongoing reform discussions by which to achieve improved private enforcement of our competition laws.

RBB Economics

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BIS Consultation on Private Actions in UK Competition Law: a Comment

RBB Economics, July 2012

In April 2012, the UK Department for Business Innovation and Skills ("BIS") produced a Consultation Paper ("BIS Consultation") discussing the future of private actions for competition law infringements in the UK.[1] This article comments on the BIS Consultation from an economic standpoint. It addresses the following proposals:

1. Expanding the role of the CAT,
2. Protecting SME complainants by creating a fast track procedure,
3. Encouraging collective actions through an opt-out provision,
4. Imposing certain presumptions on pass through and the magnitude of cartel impacts, and
5. Introducing measures to facilitate redress.

[1] "*Private Actions in Competition Law: A Consultation on Options for Reform*", BIS, April 2012.

1. Expanding the role of the CAT

The BIS Consultation proposes to extend the powers of the UK Competition Appeals Tribunal ("CAT") so that it is able to hear private actions in its own right, and not just follow-on damages claims as at present. This proposal has legal implications on which an economist is not best placed to comment, but in substantive terms there appears to be a compelling logic to this extension of the CAT's powers. The institutional knowledge of competition law principles within a specialist Tribunal such as the CAT, as well as its ability to draw on Members with business and economics expertise, does have the potential advantage that the CAT can get up to speed quicker on the intricacies of competition law claims more efficiently than a commercial court for whom the relevant concepts must often be learned from a standing start.[2]

Indeed, damages claims – the area to which the CAT's private actions role is currently confined – are arguably the one aspect of competition law in which the CAT has no particular advantage over the non-specialist commercial court. Follow-on damages cases raise a very wide set of practical challenges, but since such courts must be accustomed to dealing with "what-if" scenarios in the context of contract and other disputes that result in claims for damages, this would seem to be the facet of competition cases where the CAT enjoys least advantage over commercial courts. Damages claims are not easy to decide, but a detailed understanding of competition law is generally not critical to reaching an assessment of the extent to which one party has been wronged by another's unlawful action.

To sum up, the substantive case for the BIS Consultation's proposal to allow the CAT to judge private actions on whether an infringement occurs seems soundly based.

2. Protection for SME complainants

Section 4 of the BIS Consultation outlines a possible "fast track" route for SMEs to enable them to bring private competition law actions against large companies more easily. This proposal is linked to the proposed extension of the CAT's powers, since the BIS Consultation seems to rely on the CAT's greater flexibility on procedure to provide this fast track facility in a way that would not be open to the commercial courts.

The intended target here appears to be dominant firm conduct that excludes smaller rivals (especially SMEs) from being able to offer effective competition. The focus of the BIS Consultation's discussion is less on the ability of such firms to claim damages but more on their ability to seek injunctions to stop the exclusionary conduct. Para 4.28 of the BIS Consultation asserts that "*What SMEs need most is the opportunity to compete fairly so they can survive and grow*". Whilst it is hard to object to the potential benefits of a thriving SME sector, however, a closer look at the BIS Consultation's discussion and proposals reveals an alarming absence of substance behind these good intentions.

[2] This is not to say that the CAT will always deal better with competition arguments than a non-specialist court. There are instances in which the fresh perspective of a good non-specialist body can provide useful insight on competition issues.

2.1. Identifying the market failure

First, it is important to identify what the nature of any market failure is that justifies the proposed intervention. What beneficial role could fast track procedures play that is not already fulfilled by OFT enforcement and existing private actions options? The BIS Consultation does not address this key question directly, but we can infer that its rationale for intervention is in some way linked to the fixed costs to the individual Claimant of initiating a private action that alleges a breach of competition law.

It is first important to understand why public enforcement does not deal with the cases that the BIS Consultation wishes to encourage to take the private action route. Para 3.15 of the BIS Consultation answers this by noting that "*in a number of cases it would be an inefficient use of public resources to bring the full force of an investigation to bear*." Presumably this is because the cost of the public funds committed to such enforcement is greater than the total welfare benefits that are expected to arise from such intervention. Typically, however, the potential private gains to a single Claimant in a private competition law action will form only a part of the overall welfare benefits that arise from bringing some anti-competitive conduct to an end. But if that is the case, one would not expect private enforcement to succeed where public enforcement had already been ruled out on cost-benefit grounds. It is not clear why as a matter of public policy one would one would even want to encourage intervention (whether private or public) to take place if the costs of doing so exceed the benefits.[3]

The BIS Consultation's attempt to square this circle is its proposal to change the parameters of private actions through a "fast track" approach. This proposal raises a number of legal and procedural issues that lie beyond the expertise of an economist, but the essential thrust of this proposal is that under the fast track proposals the costs (and other dimensions such as the allowable timetable and number of experts) of the exercise are artificially capped.

Of course, imposing such constraints might reduce the expected costs of bringing a case below the relevant thresholds so that an action that was unviable previously now becomes commercially attractive. But curtailing the investigation process through the fast track route presumably also entails some loss of quality in the scrutiny and analysis that is brought to bear on the infringement allegation. If not, then one would surely wish to impose the fast track approach as the norm across all competition law actions, including public enforcement. It is notable, for example, that the OFT's enforcement efforts under Chapters I and II have consumed time and resources that far outstrip the truncated dimensions proposed in the BIS Consultation's fast track criteria, indicating that it is hard to resolve real world cases within these constraints.

To use a cricketing analogy, the fast track proposal imposes a 20:20 format on what would otherwise be a 5-day Test Match contest.[4] Experience tells us that the outcome of such a

[3] One exception to this conclusion would arise if there is some wider demonstration effect form bringing a case that would assist the resolution of other valid cases or deter anticompetitive conduct in other comparable cases. However, the OFT's enforcement criteria already provide for allowing public enforcement to occur in such circumstances.

[4] Or, to translate this analogy to a broader audience, consider the adoption of a sudden death penalty shoot-out in place of a 90-minute match between opposing football teams.

change in format might well be exciting, and that it will bring with it some crowd-pleasing attributes, but these merits come at the expense of significant compromises in the predictability of outcomes and in the ability of the contest to ensure that the best team wins. The serious point here is that the fast track proposals must increase the risk that private actions will generate the wrong result, and the cost to economic efficiency and welfare of any such increase in the error rate needs to be factored in to the assessment of its desirability. Similarly, imposing a fast track process that has less predictable outcomes could affect firms' conduct and attitudes towards risk, quite possibly leading to unintended consequences such as chilling the intensity of competition or innovation in favour of "safety first" business practices. Yet discussion of these important elements is notably missing from the BIS Consultation.

2.2. Questioning the merits of SME protection

Second, it is necessary to ask some hard questions about the likely merits of the SME complaints that are being left unanswered by the current system. Para 4.19 of the BIS Consultation admits that "*a significant number of SMEs who currently believe they are victims of anti-competitive behaviour actually have no strong competition case to bring*." But that should sound a warning to the government to proceed more cautiously towards helping SMEs to make such complaints. The BIS Consultation notably fails to provide any evidence that a competition problem does exist. On the contrary, the illustration next to para 4.24 of the Consultation cites the following illustration of the kind of behaviour by big firms that might form the basis for an SME complaint:

> *"A farmer owned a large amount of land which he had inherited from his father. His father had previously agreed a deal with a large outdoor advertising company to allow advertising on the farm land for a term of approximately 30 years, despite the fact that the Vertical Block Exemption stipulates that an agreement of this nature cannot be longer than 5 years. This was preventing the farmer taking advantage of a higher-priced offer from a rival company."*

However, the fact that the Block Exemption does not apply to agreements that have a duration in excess of 5 years does not (contrary to the impression created by the BIS Consultation) render all such agreements anti-competitive, and any such interpretation would chill many pro-competitive contractual arrangements. Indeed, on the limited information provided in the above illustration it appears highly unlikely that the SME farmer in question would have a legitimate competition complaint.[5] It is also highly significant that, if this complaint were to succeed, the motivation for the farmer's complaint would be the low prices that the farmer received under the existing contract and the outcome would be to grant the farmer an ability to walk away from that agreement with the result that prices would increase. There can of course be circumstances in which valid competition policy intervention leads to higher prices, but since the overall aim of

[5] In the unlikely event that any anti-competitive foreclosure effects arose from this long term agreement, the victims would in any event be third party advertising firms that were prevented from doing business, and not the SME farmer. In any event, it seems exceptionally implausible that inability to access a single small farmer's property would foreclose any meaningful advertising market.

competition policy is to secure lower prices and better consumer welfare outcomes one ought to be at least suspicious of interventions that have the opposite effect.

This illustration is by no means exceptional within the context of the BIS Consultation. Para 4.32 of the BIS Consultation states that the proposed fast track model would focus on securing "*non-monetary resolutions such as injunctions*". Yet in almost every case and illustration cited, the BIS Consultation envisages injunctions that would allow the SME complainant to prevent the introduction of a new product by a competing firm or to protect the SME from the consequences of "unfairly" low prices.

Notably, all of these illustrations cited by the BIS Consultation involve actions that would protect SMEs from competition and would have the immediate effect of denying consumers the benefits of unfettered competition. In short, the proposals set out a fundamentally *protectionist* framework to assist SMEs. It is therefore hard to escape the conclusion that the authors of the BIS Consultation have been captured by an essentially protectionist SME lobby whose interests are in the main antithetical to the normal objectives of competition policy. At the very least, proponents of this protectionist lobby ought to be put to much stricter proof that their interventions would contribute to consumer welfare. The evidence we see in the Consultation, in common with experience more generally of such protectionist lobbying, does not inspire confidence that this test would be satisfied.

3. Encouraging collective actions

When it comes to private actions for damages, the BIS Consultation states that the primary aim should be to create a framework that allows consumers and businesses that are adversely affected by competition law infringements to be able to obtain redress for the commercial damage they have suffered. The clear objective here is to enable private parties to achieve compensation, an objective that is distinct from the primary objective of public enforcement, which is (see BIS Consultation para 3.8) to deter anti-competitive conduct.

A private actions framework that aims to facilitate compensation must be capable of following the effects of anti-competitive conduct down through the supply chain, since there is no doubt that the true impact of many competition law infringements can be passed on to some extent from the immediate customers of the infringing firms to their customers, and so on down to end consumers. This raises two major problems, both of which are identified indirectly in the BIS Consultation.

- First, it is often a factually very complicated matter to assess how the effects of anti-competitive activity (say a supra-competitive price due to a horizontal cartel) are ultimately distributed between immediate customers (who purchased the cartelised good) and indirect customers (who in turn purchased the products of the immediate customers, an input of which was the cartelised good). The more links there are in the vertical supply chain, the more complex it is to measure how these effects work themselves out. This complexity is magnified by the fact that the participants at different levels of the downstream supply chain will be competition against one other in their claims for the damage.

- Second, in the typical case the effects become more diffuse as they move down the supply chain, so the damage suffered by each individual entity becomes smaller in absolute terms. For products that are ultimately sold to individual consumers, the damage to each individual can often be very limited, even if in aggregate that damage is substantial when spread across multiple consumers.

Both of these factors present major challenges to the viability of private actions that are aimed at securing compensation. The most significant BIS Consultation proposal to deal with this problem is to offer some encouragement for collective actions by classes of affected parties. It proposes to do so by introducing an opt-out provision that would make it easier for those bringing collective actions to secure the necessary critical mass of similarly affected consumers. However, in an effort to suppress the influence of private actions claim specialists only bodies such as trade associations or consumer groups that can reasonably be considered to be representative of the affected consumers would be able to take advantage of such provisions.

Again, such proposals raise legal and procedural issues on which economists are perhaps not best placed to comment, but if the government is serious about creating a framework to facilitate compensation-related private damages actions it is hard to see how this objective could be achieved without some positive encouragement to collective actions. Allowing a group of similarly-affected end users, each of whom suffers a small absolute damage from the infringement, to aggregate their claims is the logical way to overcome the difficulty associated with the high fixed cost of making such a claim and avoiding the wasteful duplication of effort that would be associated with multiple claims on the same substance.

The question is whether such encouragement will solve the aggregation problem, but create other distortions by tipping the balance too far in favour of Claimants. Para 4.10 of the BIS Consultation rightly states that "*Allowing for higher than actual damages can distort the grounds to settle*" and Annex A to the BIS Consultation contains a fuller discussion of the risks associated with an unwanted lurch towards the dreaded "compensation culture". It seems plausible that the BIS Consultation's caution in avoiding a move towards US-style treble damages and in limiting the classes of entity that can mount a collective action will control this risk of an overshoot from too little to too much private litigation. However, there are so many uncertainties in the system and the way it might operate under the proposals that it may not be possible to assess this until the new regime is tried out.

4. The BIS Consultation's proposed presumptions on pass-through and cartel impacts

Even if a collective opt-in arrangement succeeds in aggregating many small end-user claims into a value that makes the litigation stakes worthwhile for the Claimants, the BIS Consultation recognises that the practicability of making a private damages claim that compensates the victims of competition law infringements also depends on keeping the claim itself suitably simple. With this in mind, the BIS Consultation proposes two separate legal presumptions that are intended to shift the balance of power from Defendants to Claimants.

- First, it discusses the option of imposing a presumption that damages are passed through the chain in their entirety, all the way to the end user.

- Second, it suggests applying a presumption that the uplift on selling prices caused by a cartel infringement should be at least 20%.

The intention seems to be that such presumptions should form a kind of default position in the event that the point is not contested, or that the judge decides that the factual record is too complex to reach an informed view. However, in order for a presumption to play a legitimate role there must be some relationship between its ability to simplify the legal assessment, and the extent to which it represents the true picture that would emerge in the absence of such measurement difficulties. There must, however, be doubts as to whether either of these presumptions will improve the accuracy of private actions, and there is a strong possibility that they would have the unintended effect of increasing, rather than reducing, the cost and complexity of bringing private actions.

4.1. The pass-through presumption

A presumption that all damages are passed all the way through to the final user is intended to help end consumers to claim damages. It would certainly appear likely to hamper private damages claims from direct purchasers, the category of third parties that is most likely to have suffered a sufficiently large and immediate impact to be able to justify the expense of a private damages claim.[6] Pass through arguments are used primarily by Defendants in such claims to diminish the size of the damages that their immediate customers have suffered, and as such this aspect of the proposal would have the unintended consequence of benefiting those who have infringed competition law.[7]

Whether this dampening impact would be offset by an increase in claims from consumers further down the supply chain is open to question. The BIS Consultation appears to have a simple textbook model in mind in which raw materials are supplied to manufacturers who then supply to retailers who sell to ultimate consumers. Some real world industries do indeed conform to this framework, but many do not, and that leaves open substantial scope for arguments as to where in the vertical chain the buck should stop.[8]

Further, since the degree ef pass-on depends on a number of complex factors including the shape of the demand curve and the nature of competitive interaction between rival suppliers, an assumption of 100% pass-through is likely to apply only in exceptional cases. Hence, the presumption will, whatever its legal status, be seen by economic experts and judges as obviously unreliable.

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[6] Indeed, the public policy rationale that underlies US case law under cases such as Illinois Brick deliberately denies pass-through claims precisely because of concerns that taking pass-through into account will dilute claims and deter private actions.

[7] Even with complete pass-on, however, it is possible to observe some damage suffered by direct customers, associated by loss of sales volume.

[8] Consider, as an illustration, how the proposal might affect a follow-on action from the alleged cartel in the car windscreen market. Windscreen manufacturers sell the cartelised products to car manufacturers who sell (via distributors) to car buyers. Many car buyers are end consumers, but many are also private entities such as taxi firms who sell their services to consumers who include lawyers who in turn pass their disbursements on to their clients, and so on ...

It is doubtful whether a presumption that bears such a weak relationship to reality could play a useful practical role in resolving disputes between opposing parties. Even if it formed the starting point for a dispute, if that starting point is manifestly far away from the ultimate destination it will encourage the deployment of significant amounts of effort and cost as the parties to a dispute seek to find a more realistic solution. Hence, the notion that a pass-through presumption will ease the end consumer's task of obtaining damages is unlikely to hold true. The fact that the BIS Consultation makes no firm recommendation on adopting this pass-through assumption is to be welcomed, since there is a danger that if adopted it would lead to greater confusion on damages claims and have at best limited scope in pushing disputes towards a quick conclusion.

4.2. The 20% price uplift presumption

Recognising that damages claims in fact rely on establishing complex counterfactuals, the BIS Consultation also proposes to insert a general presumption that the effect of a cartel infringement will be to have a 20% uplift effect on the prices charged by infringing firms. Para 4.43 justifies this 20% price uplift presumption as follows (emphasis added):

> *"The Government recognises the fact that the damage caused by cartels varies from case to case and that any given figure is unlikely to be correct for all cases. However, the figure of 20% represents the lower end of the range that the current economic literature suggests prices can be raised by and is therefore considered a more appropriate starting point than the current apparent presumption that a cartel has caused no damage. The figure of 20% was also indicated as the average in the recent draft EU guidance paper."*

However, this presumption would be problematic for a number of reasons.

First, there would be substantial uncertainty in distinguishing between cases where the 20% presumption did and did not apply. The term "cartel infringements" covers a potentially wide variety of conducts and circumstances, many of which could fall well short of a classic horizontal price-fixing cartel. For example, competition authorities have shown increasing interest in pursuing conduct such as horizontal information exchanges as "object" infringements, and have carried out a number of investigations into vertical and "hub-and-spoke" agreements on the (frequently unjustified) grounds that they are akin to horizontal cartels. However the economic studies the BIS Consultation refers to focus on "classic" hardcore cartels, not on these more complex types of conduct. Crucially, economic theory strongly suggests that information exchanges, for example, are generally less likely to have significant effects on competition than hardcore cartels. Moreover, there is no clear bright line test for distinguishing between "proper" horizontal cartels and these other forms of potentially anti-competitive forms of conduct. As a consequence, one might expect that vigorous debate on whether a 20% price effect

presumption would even apply in any particular case would attract a great deal of unproductive effort which would add to costs but provide little real illumination.[9]

Second, the BIS Consultation's claim of the existence of an "economic literature" consensus around the 20% impact is, contrary to the confident assertion above, highly controversial. It is based essentially on a survey article of numerous individual studies of horizontal cartel impacts, many of which fall well short of the rigorous standards that would be required to form the basis for a reliable public policy conclusion. Moreover, the survey sample on which the study in question has been assembled has been criticised for biasing the estimate systematically in favour of relatively high impact estimates. This is because studies that find substantial cartel effects are more likely to be published, and therefore to be included in the survey sample, than those finding little or no effect.[10] The BIS Consultation's contention that a 20% impact lies "at the lower end of the range" is particularly surprising, since no one who has studied the impact of cartel infringements would deny that a substantial proportion of attempted cartels fail substantially or wholly in achieving their aims. Indeed the studies the BIS consultation refers to clearly disprove the notion that there would be a "minimum" effect of cartels. Rather, to the extent that such studies offer any robust conclusion, they clearly show that the effects of cartels on prices differ substantially across cases, ranging from zero to 50% and more.

The 20% figure (and indeed higher figures, such as the 20-35% range cited by the OFT in its recent consultation on penalties) has been widely quoted by DG COMP and (as the BIS Consultation notes) is reproduced in the economic study that was commissioned by DG COMP on private actions.[11] However, repeated citation of a study does not make it more reliable.

If the 20% impact presumption was soundly based on empirical evidence, this would itself raise much more substantial issues about the adequacy of the public enforcement regime, since it would suggest that basing fines on a figure set at 10% of a company's relevant turnover would systematically fail to allow competition authorities to provide adequate deterrence. As a simple illustration, if a company perceives there is a 50% risk of detection, the fines for a cartel infringement would need to be set at a level more than double the expected gain in order to provide deterrence. On the BIS Consultation's assumption that cartels typically create a 20% price uplift, that would imply a need for *average fines* to be set at a level above 40% of the infringer's normal turnover in the affected markets.

This in part reflects the reasoning behind the OFT's recent consultation on competition law penalties in which the OFT proposes to raise the starting point for fines from 10% to 30% of relevant turnover.[12] Even this three-fold increase would appear to be inadequate if the 20%

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[9] Alternatively, it might be envisaged that the presumption would apply to any form of anti-competitive conduct that was deemed to meet an "object" test. But if so that would magnify the already strong objections to relying on the economic literature to justify this presumption.

[10] See Rosati and Ehmer, "*Science, myth and fines: Do cartels typically raise prices by 25%?"* Concurrences Competition Laws Journal, No 4, 2009. Conner, the author of the original review article, subsequently responded in "*About Cartel Overcharges: Kroes is* Correct", Concurrences, No 1, 2010.

[11] See Oxera, "*Quantifying antitrust damages: towards non-binding guidance for courts*", December 2009.

[12] See "OFT's guidance as to the appropriate amount of a penalty", October 2011, available at http://www.oft.gov.uk/shared_oft/consultations/oft423con.pdf

presumption were valid (unless one believes that the risk of detection is close to 100%). As we discuss further below, the real requirement here is for a more serious assessment of the actual impact of different forms of competition law infringement. In this respect, it is interesting that recent Judgments by the CAT have tended to be critical of the OFT's approach to setting fines, and have led to fines being reduced significantly below the levels set by the OFT even when it used 10% of relevant turnover as the starting point.

Third, given the lack of robust evidence behind the 20% presumption, it would be subject to the same practical questions as those raised above in relation to pass-through. If the 20% presumption held sway, it would seriously risk providing an opportunity for unjust enrichment for damages claimants, thus creating a risk of the very distortions in the incentive to settle cases that para 4.10 of the BIS Consultation identifies as potentially harmful. More likely, the absence of any robust basis for the 20% presumption would in most cases lead to Defendants hotly contesting the validity of any claim that relied on the 20% presumption.[13] Thus, whilst the presumption might alleviate the initial load on Claimants when putting together a claim, the high probability of a vigorous rebuttal from the Defendants could be expected quickly to escalate the debate to a full review of the merits of any such claim. Hence, the idea that the presumption "*would reduce the need to assemble extensive economic evidence*" (BIS Consultation para 4.41) scarcely seems plausible.[14]

Ultimately, a legal presumption on damage impacts that is not well supported by the evidence will clearly attract substantial levels of Defendant effort, and if (as seems likely) the presumption is consistently overturned, this will surely come to undermine the ability of such a measure to affect the outcome of cases.

5. Measures to facilitate redress

Finally, one of the most interesting initiatives in the BIS Consultation is the proposal to give competition authorities the (discretionary) power to oblige infringing businesses to provide redress to those adversely affected by their unlawful actions. If this proposal is implemented, this power would be enforced after an infringement had been found. The details of how such a scheme would work are not fully explained, but the Consultation appears to envisage a process within which the OFT would play an important role encouraging infringing firms to reach a damages settlement as a way to avoid a costly private action for damages.

This notion that the OFT could play a more prominent role in private actions emerges almost as an after-thought in the BIS Consultation. But the idea that deterrence objectives of public enforcement and the compensation objectives of private enforcement might be integrated within a common framework has an inescapable logic.

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[13] BIS Consultation para 4.40 refers to the scenario in which neither side chooses to offer any economic evidence, happy to rely on the 20% presumption. But it would be extraordinary if this scenario ever applied.

[14] There are analogies with other controversial presumption that are frequently invoked in competition law, such as the presumption that firms enjoying market shares in excess of 40% are "presumed" dominant on some readings of the Article 102/Chapter II case law. There are few if any instances where this presumption has persuaded the allegedly dominant firm to give up on efforts to argue that the presumption can be rebutted.

Having opened up this Pandora's Box, however, the BIS Consultation then tries hard to shut it. Para 6.39 of the Consultation insists, for example, that the OFT should remain oddly disassociated with the detail of any such settlement despite its key role as the facilitator of any redress arrangement. Specifically, it states that the OFT "*would not attempt to quantify individual loss*" and that the power to implement a settlement would be "*entirely independent of any fines or other sanctions imposed*." The BIS Consultation also asks for views on whether an offer by an infringing company to pay redress should be taken into account when the OFT sets the level of the fine for the infringement, although para 6.43 is strongly inclined against any such offsetting mechanism on the grounds that "*Compensation for damages, to which victims are legally entitled, should be seen as additional to, and not as a substitute for the fine*."

Such statements fail to give proper consideration to the relationship between penalties for deterrence and compensation. It is correct to say that the compensation objective behind private actions is *different* from the deterrence objective that drives public enforcement, and that the financial penalties on infringing firms that are appropriate to achieve these different objectives will not coincide exactly. However, that does not justify the BIS Consultation's suggestion that the two should be considered as "*entirely independent*" of one another.

To illustrate, consider a simple case in which an unlawful cartel elevates prices paid by consumers by £100m, and the cartel members perceive they face a 50% risk of detection. Any punishment for the infringing firms in this cartel that lies below £200m will fail to provide optimal incentives for deterrence – in fact if penalties lie below this threshold participation in the cartel would (on purely financial criteria) be the rational commercial choice. However, the correct level of compensation payments to affected customers would simply be the £100m impact of the cartel. In this sense, one can see that the penalties for deterrence and compensation are not perfect substitutes for one another.[15]

However, suppose that two such cartels in different industries are detected and prosecuted by the OFT, but that cartel A is then subject to a follow-on damages action whereas customers affected by cartel B judge that it would not be cost-effective to mount a claim. This could result in the members of cartel A facing total penalties of £300m whereas those involved in cartel B would pay only £200m. If £200m represents the optimal level of deterrence, the risk is that the element of double-counting in the case of cartel A creates a sub-optimal incentive structure (or, in simple terms, a punishment in excess of the crime).

The key insight here is to recognise that private actions work as a partial substitute for fines, and the obvious public policy solution in cases prosecuted by public bodies would be to fund the compensation out of the money collected in fines.[16] This argument is mentioned (see paras 6.42-43) but the BIS Consultation provides no real reason for rejecting it.

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[15] In practice, the relationship between optimal fines and damages could be somewhat more complex. For example, it is clearly legitimate on deterrence grounds to elevate fines in cases where the infringer is a repeat offender, or to discount fines where this is part of an effective leniency programme. But the introduction of such complications does not invalidate the benefits of considering fines and damages in a consistent framework.

[16] Note that if damages were paid from revenues collected in fines, that could also have the benefit of continuing to protect leniency applicants, whereas, as is discussed at Section 7 of the BIS Consultation, independent private action liability for such applicants risks undermining the incentives that have made the leniency approach so effective in uncovering cartel activity.

Perhaps one reason for the BIS Consultation's reluctance to acknowledge the case for linking fines with compensation is that this might shed unwelcome light on the failure of existing fining principles to take serious account of the actual economic impact of competition law infringements. In a policy environment in which the government is keen to promote private compensation, this disconnect between fines and impact seems, however, increasingly hard to justify.

Para 6.31 of the BIS Consultation stresses that "*the Government would not wish the OFT to become so involved in the business of quantifying the degree of loss suffered by consumers or businesses that this led to an impairment in carrying out its other functions*." This point is well taken, but it ignores the substantial benefits that would arise if the OFT engaged more with assessing the likely effects of competition law infringements. Financial sanctions that are set with no reference to the likely effects run a serious risk of failure to provide optimal levels of deterrence, and tend to undermine the legitimacy of enforcement actions. Moreover, the investigating body on a cartel case has a uniquely good opportunity to assess and evaluate the likely impact of the conduct in question. Yet it is remarkable how little information on effects can be gleaned from cartel decisions when it comes to follow-on actions, and the difficulty of assembling the relevant market data, often several years after the infringement has ceased to operate, is in practice a material barrier in constructing robust estimates during private damages actions.

There is an intrinsic link between this question and the broader question, raised above in relation to the proposed 20% price uplift presumption, of how fines should be set for competition law infringements. It is hard to disagree with the principle that fines should reflect the "seriousness" of the infringement, and yet the actual approach to determining fines comprises a series of essentially mechanistic steps based on affected turnover that seem to be designed to minimise any risk of a real debate on the economic impact of the conduct in question.

Even the argument that this mechanistic approach avoids the scope for disagreement and delay does not seem to be supported by recent Competition Act evidence. Specifically, in different ways the recent CAT Judgments in the separate cases involving cover pricing practices in the construction industry, and recruitment consultants in the construction industry, have resulted in substantial reductions (of between 50 and 90%) of the fines that had been levied by the OFT.[17] The reasons for the reductions were very different in the two cases, but in both cases they reflected a recognition that the OFT's mechanistic turnover-based approach to setting fines had failed to reflect the actual likely impact of the infringements.[18]

These (and other) CAT Judgments provide a clear signal to firms involved in cartel infringements that the appeals process provides scope to secure significant reductions in fines that are set on the basis of mechanistic rules based on affected turnover, because such rules

[17] See CAT Judgments on the Construction cartel (Kier *et al*) appeals of March and April 2011, and the CAT Judgment in the Recruitment consultants cartel (Hays *et al*) of April 2011.

[18] In the construction cover pricing cases, the CAT was influenced by the fact that the infringement was likely to have "limited adverse effects"; in the recruitment consultants case the seriousness of the cartel was not questioned, but the CAT baulked at the fact that, due to an oddity in the way in which turnover was reported by the cartelists, the Appellants' arguments for basing the fines on an alternative turnover measure based on value-added would provide a "more meaningful" basis for the fines.

will often fail to match the actual impact of the infringement. As things currently stand, Appellants against the level of fines are forced to concentrate their arguments on the formalistic framework that has been set out to determine the calculation of fines, but behind the artificiality of this debate is a set of substantive questions on the likely impact on customers and consumers of different forms of anti-competitive conduct. It is encouraging that the CAT has exercised its discretion within the current framework to apply such significant adjustments to OFT fines that it felt did not have a meaningful connection with the impact of the offences involved. But if it is ultimately the economics that drives such adjustments, it would be more rational to adopt an approach to fines that reflects a more effects-based assessment.

The inability of the OFT's current framework for determining fines to ensure that penalties match the adverse impacts of competition law infringements raises issues that may go beyond the BIS Consultation's intended agenda on private actions. However, when considering the desirability of a policy that deters wrongdoing and compensates its victims, it becomes increasingly hard to justify disassociating these linked themes.

These policy strands could be better aligned by requiring the OFT to take more explicit account of likely effects when levying fines, whilst recognising that it would also be appropriate to adjust any effects-based penalties to reflect other legitimate policy objectives of ensuring deterrence, punishing recidivism, and providing incentives for leniency applicants. Then, if a process is to be inserted to enable the OFT to facilitate compensation, it would be logical to allow some portion of the money collected in fines to fund the compensation that is paid to the victims of this unlawful conduct.

To take this step it would be necessary (and justified) for the OFT to take a more hands-on approach in linking fines to the impact that infringements have on market outcomes. An approach to policy that made more effort to integrate the different but related objectives of deterrence through public enforcement and compensation for victims through a private actions regime would not be easy to develop. But it could ultimately address many of the problems associated with the current tensions between private and public enforcement.

RBB Economics
London
July 2012

Reaching Justice Wales

Dear Sirs

I write in response to the consultation on *Private Actions in Competition Law: A Consultation on Options for Reform*.

I am a Trustee and the Treasurer of Reaching Justice Wales//Cyrraedd Cyfiawnder Cymru. This charity aims to contribute to the availability of legal advice across Wales. The Charity supports voluntary sector agencies which provide free legal advice where there is need, supplementing but not replacing legal aid. It is a wonderful opportunity for the whole profession to demonstrate its continuing commitment to access to justice for all.

Integral to the success of this new organisation is that it draws together all of the various strands of the legal profession in Wales: Solicitors, Barristers, Chartered Legal Executives, Judiciary, Academics, Employed lawyers and Law Students. The Charity's Chairman is His Honour Judge Seys-Llewellyn QC, the Designated Civil Judge for Wales and its President is Lord Justice Malcolm Pill.

The Trustee Board has asked me to write to you on their behalf having seen the letter dated 26 June 2012 submitted by the Access to Justice Foundation in response to your consultation the contents of which we agree and support. We would wish to emphasise the three main points made by the Foundation with which we strongly agree:

● Collective actions should be introduced and unclaimed sums should be paid to a single specified body

● Access to justice is the area of public service most appropriate for gaining benefit from these funds.

● We agree that the Access to Justice Foundation is the most appropriate recipient of these unclaimed funds due to their primary purpose of funding advice services throughout the UK and their independence from advice sector membership bodies.

Yours faithfully

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19 July 2012

Our Ref: KMH\LZK\999983.15873

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Dear Sir

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

We welcome the consultation launched on 24 April 2012 by the Minister, Norman Lamb MP, on private actions in competition law, and set out below our responses to the specific questions.

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

In principle, we welcome this proposal as long as transfer to the CAT is subject to the agreement of the parties and is not (or does not become) automatic. This is because there are many cases in which the competition issues are subsidiary to the main issues and other cases in which the competition arguments should be dismissed as being of no sufficient substance. In such cases, it would be inappropriate to transfer them to the jurisdiction of the CAT and to engage the latter's three-person tribunal system. A transfer system would have the merit of enabling the same tribunal to deal with appeals from the OFT and any related damages action that might have been commenced in the High Court.

By the same token, it may be appropriate to transfer, with the agreement of the parties, damages claims to the High Court once the competition findings have been made given the greater experience of the High Court in calculating damages.

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

If competition cases are to be transferable to the CAT, then it would be logical to allow the CAT to have jurisdiction over original stand-alone actions as well as follow-on cases, as long as the parties

agree. The appointment of all Chancery Division judges as Chairmen of the CAT should ease the latter's work-load.

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

If the CAT is empowered to try stand-alone competition cases, then it should have the same power as the High Court to grant injunctions.

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

While we have some sympathy for the position of SMEs, it is also the case that distortions of competition adversely affecting larger companies lead to consumers suffering harm and we are wary that fast tracking some cases is slow tracking others, and apparently simple cases can be quite complex. We agree that the primary concern of those adversely affected is to secure injunctive relief rather than damages but in our view the examples given in Box 2 of the consultation paper are all cases in which interim relief should be available in short order, irrespective of the size of the parties concerned.

Rather than special procedure for SMEs, it might be more appropriate to introduce a 'small claims' type procedure which would be closer to the Patents County Court system mentioned in paragraph 4.27 of the consultation document. This combined with rigorous case management should assist in achieving an efficient outcome. Under such a scheme, damages claimable would not be more than, say, £5m; the cross-undertaking for damages when an injunction is issued is limited to a fixed amount, and each party's liability for the other party's costs would not exceed say £25-50k.

We also consider that the rules relating to the time when follow-on actions might be brought in the CAT under s47A of the Competition Act and Rule 31 of the Competition Appeal Tribunal's Rules should be amended so that they are aligned with those of the High Court. There is no justification for not allowing a case to be commenced immediately after an infringement decision has been made, if the claimant so wishes, and for the claim to be progressed up to the point immediately before setting down for trial and then stayed pending the outcome of related appeals especially those in the General Court and ECJ. This route which has been adopted by the High Court is consistent with EU law, with the High Court having discretion as to the award of costs. The enforced delay in bringing a claim necessarily risks damaging the quality of evidence available (loss or destruction of documents; personnel changes; recollection issues etc) and risks the opportunity of bringing a claim being lost.

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

Please see our answer to Q4.

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

Please see our answer to Q4.

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

We do not consider that this is necessary. It is for the claimant to establish its loss. The recent decision of the Competition Appeal Tribunal in 2 Travel Group v Cardiff City Transport demonstrates the ability of small businesses to bring successfully damages actions. We do not see that there is a justification for distinguishing between cartel and other cases.

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 note that the Government is not convinced that there is a case for legislation to address directly this issue and we agree. A presumption (even if rebuttable) that there had been passing on would unfairly affect the balance of claims as between direct and indirect purchasers.

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.

In our view, it is critical part of developing a compliance culture that those who infringe should pay compensation to those injured; this principle should apply to all infringements – not just cartels. We agree that bodies designated under s47B CA should have power to bring stand alone actions as well as follow on claims.

It is the case that sometimes the size of the individual harm is low and therefore many consumers will not wish to pursue a claim even if handled by a third party on their behalf – in those cases, the key form of punishment will be the fine imposed by the OFT or concurrent regulator. As noted in response to Q29 we support the idea that the OFT (or concurrent regulator) should have a power to require an infringer to implement a redress scheme or to support some other compensatory project, such as financing publicity about detecting infringements, support for the Competition Pro Bono Scheme etc.

We do not consider it appropriate to allow groups other than those covered by s47B the right to bring collective actions other than within the scope of the existing rules of court. We have direct experience of Group Litigation Orders and in our view these work well to simplify and co-ordinate claims made by a number of businesses. We sought and obtained a GLO in April 2001, ordered by Cresswell J, in a case brought by a group of businesses in relation to the alleged unlawful termination of their distribution agreements by their supplier who was our client: Prentice v DCUK (see a summary of the order at http://www.hmcourts-service.gov.uk/cms/150_153.htm). It has been said that a disadvantage of a GLO is that all claimants have to file their own proceedings: as each claimant has to prove its own loss, we do not consider that this is a major issue. We respectfully agree with the Chancellor's comments in Emerald Supplies v British Airways [2009] EWHC 741 (Ch) at paragraph 38 of his judgment, and which was upheld on appeal.

We are in favour of representative actions, GLOs and consumer actions under s47B CA but do not support opt out 'class' actions. In our view, requiring a group to be determined before a claim is brought is likely to impose a degree of pre-testing of the claim as parties have to make a conscious

decision to participate; this avoids speculative litigation and the 'litigation culture' that the UK has always sought to avoid.

We note that the proposals relate to competition claims only and not to other classes of action including other economic torts. While we agree that those harmed should be able to recover redress, we are not convinced that competition cases should be singled out in this way.

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

Please see our answer to Q9.

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

Please see our answer to Q9.

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

Any form of joint action brings with it the risk of anticompetitive information sharing. This risk needs to be managed by those running the litigation with, as necessary, establishing a court-approved confidentiality ring of the kind now common in CAT and other cases. This should be addressed in any pre-action protocol – see Q25.

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

Please see our answer to Q9.

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

Please see our comments in our answer to Q9 on collective actions.

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

As noted in our answer to Q9, we are not in favour of opt-out collective actions.

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

As a general principle, our view is that exemplary damages should be permitted in appropriate competition cases and indeed have recently been awarded by the CAT.

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

In our view, the loser-pays principle has a useful disciplining effect on claims and deters frivolous and speculative claims. However, our US colleagues have drawn our attention to the fact that in the US antitrust cases, the doctrine that each party is responsible for his own legal fees (including prevailing plaintiffs), commonly referred to as "the American Rule", is varied in respect of antirust cases. Section 15(a) of the Clayton Act, 15 U.S.C. states:

> "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including **a reasonable attorney's fee**." [emphasis added].

Notably, this statutory exception to the American Rule applies only to losing defendants in antitrust cases, and does not require a losing plaintiff to pay the attorneys' fees of a prevailing defendant. Thus, the normal civil antitrust case in the U.S. does not require a losing plaintiff to pay the opposing party's fees.

As noted above in answer to Q4, in a small claims procedure, there might be a cap on recoverable fees.

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?

This may be appropriate in exceptional cases but the court would need guidance as to when it might be appropriate to depart from the principle.

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

We agree with the Government's reasoning that contingency fees should continue to be prohibited in collective actions. Conditional fees should continue to be permissible.

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 noted in our answer to Q9, we are not in favour of opt-out collective actions. If these were introduced we agree with the proposal in the consultation paper that any undistributed sums should be handed over to a single specified body with a remit to promote competition, such as the Competition Pro-bono Service, or access to justice, such as the Access to Justice Foundation.

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?

Please see our answer to Q20.

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 in our answer to Q9, we are not in favour of opt-out collective actions.

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 noted in our answer to Q9, we are not in favour of opt-out collective actions.

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

We agree that ADR should be strongly encouraged but should not be mandatory. It will not work unless both parties have a genuine desire to settle. To make ADR mandatory would increase the 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?

It would be helpful to have a pre-action protocol for the proposed small claims procedure and for all CAT cases. This should address issues such as confidentiality in the context of multi-party claims: see our answer to Q12.

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

We agree with the proposal to ensure that the CAT's rules are amended to facilitate such offers.

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

We are aware that specialist ADR mediator services for competition law already exist, and we make our clients aware of these. To date, demand for these services has been almost non-existent (see our answer to Q24).

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

No comment.

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 with this proposal. Moreover, fines imposed could be used for some remedial purpose e.g. informing and advising consumers.

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 competition authorities might be given discretion to take such redress into account, though the level of fines would also have to reflect other factors such as the severity and duration of the infringement, the deterrence effect and recidivism.

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

In our experience, the major factor in encouraging compliance is the risk of dawn raids and, in cartel cases, the risk of imprisonment. Secondary considerations include the impact on the share price, the level of fines and compensation payable to third parties.

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

Yes, otherwise the attractiveness of the leniency regime would be severely reduced and with it the ability of the competition authorities to stamp out infringements. In our view, any documents created for the purposes of a leniency application should be protected from disclosure, irrespective of whether the application is fully successful or not. Pre-existing documents disclosed to support the application (such as notes of meetings, emails etc) should not be protected as these would in any case be likely to be relied on by the OFT or concurrent competition authority in the infringement decision.

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?

A successful or partly successful leniency applicant should not have joint and several liability for fines imposed on other cartel members but we not agree that leniency applicants should not have joint and several liability in civil cases for the harm done. Such a proposal is inconsistent with the objective of ensuring that affected third parties are compensated.

In our view, successful or partly successful leniency applicant should continue to bear joint and several liability for tortious loss but subject to the court's discretion to ensure that this does not lead to unfairness towards the leniency applicant, such as, for example, where no claim is brought against other cartel members who have lodged appeals.

We do agree that a successful or partly successful leniency applicant should not bear any responsibility for any element of exemplary damages awarded by a court.

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 have any comments on this at this time.

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

The BIS consultation document is comprehensive, covering a huge range of issues. It may be that further consultation on certain aspects would be required. We would be happy to assist in this process.

Yours faithfully

Reed Smith LLP

Reed Smith LLP

RMI

NFDA
NATIONAL FRANCHISED DEALERS ASSOCIATION

24 July 2012

Consumer and Competition Policy
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Dear Sirs

Private actions in competition law – a consultation on options for reform

The National Franchised Dealers Association (**NFDA**) welcomes the opportunity to comment on BIS' consultation 'Private actions in competition law – a consultation on options for reform' (the **Consultation**).

The NFDA is supportive of any initiative that attempts to deliver more effective means of redress for businesses and consumers, which have been the victims of anti-competitive agreements or behaviour. The issue is particularly pertinent in respect of the NFDA's membership, which is largely comprised of small and medium sized enterprises (**SMEs**) occupying a weak negotiating position vis-à-vis more powerful vehicle manufacturers.[1]

In the NFDA's view, in the motor retail sector, the interests of consumers are closely aligned with those of retailers, with retailers serving as the key channel through which consumers can access greater choice and more competitive pricing, and experience improved customer service and quality (both in relation to sales and after-sales services). It follows that any measure designed to facilitate the enforcement by SMEs of their rights against powerful trading partners - to ensure greater independence amongst retailers but without encouraging unmeritorious claims - will help consumers and should be explored.

[1] Although many of the NFDA's members are SMEs, the nature of the automotive industry is such that even larger retail groups have negligible negotiating power when it comes to dealing with global vehicle manufacturers. It follows that for the purposes of this submission, references to the position of SMEs shall be deemed to include larger groups, which although not falling strictly within the SME category are in a similar position in terms of access to justice.

At the same time, the NFDA would stress that simply improving the process through which claims can be brought is not enough. While recognising the importance of economic analysis in competition law matters, the NFDA is equally concerned that the enormous emphasis placed on demonstrating the economic effects of certain agreements and behaviours may act as a barrier for smaller companies to pursue claims (in terms of cost, time and certainty). With this in mind, it is important that underlying rules and guidance documents are clearer (and more detailed) in order to make the application of competition law more predictable and enable smaller businesses to identify their rights and causes of action more cost-effectively.

The NFDA's contribution is not intended to provide a comprehensive response to all of the questions raised in the Consultation, as certain questions are outside of the NFDA's experience; instead, the NFDA's response comments on certain discrete topics which feature in the Consultation.

About the NFDA

The NFDA is part of the UK's Retail Motor Industry Federation. The NFDA represents the interests of franchised motor vehicle dealers and authorised repairers operating in the UK motor retail sector.

The motor retail sector is one of the most important business sectors in the UK. NFDA research suggests that the annual turnover of the motor retail sector in the UK is around £14 billion and it employs approximately 570,000 people in around 70,000 businesses.

The NFDA is the UK's leading retail trade association in this sector, with over 4,700 dealers. The vast majority of the NFDA's members are SMEs who sell directly to consumers (as well as corporate customers, fleets etc).

Consultation

The NFDA agrees that a strong competition regime is fundamental to growth in the UK economy. It is vital that any measures introduced or modified should encourage investment and innovation amongst businesses and ensure that consumers get the best deal possible.

Furthermore, rights which cannot be enforced in practice are worthless. It is essential that where rights are infringed, it should be possible to enforce those rights effectively. The NFDA is concerned that this is not always the case, particularly in relation to the enforcement by SMEs of their rights against larger undertakings, especially those with whom they have an important commercial relationship and where the issues involve complex competition arguments.

There is the perception amongst SMEs in the motor retail sector, rightly or wrongly, that regardless of the merits of their claim, their business will suffer if they, as a named claimant, initiate proceedings against a larger trading partner. In this regard, BIS' consideration of 'collective action' as part of the Consultation is particularly important.[2]

B2B private enforcement

[2] Page 27 of the Consultation document

Where a breach of competition law harms a group of businesses, individual claims are often an ineffective means to obtain compensation for harm caused or to prevent unlawful practices from continuing. There are various reasons for this, not least because often the individual loss is small in comparison to the costs of litigation. However, there are also other factors which have a bearing on the decision to commence proceedings.

For example, dealers with a valid claim against a large vehicle manufacturer may be deterred from taking enforcement action in light of the fact that the defendant is an important commercial partner. Depending on the circumstances, collective redress (and, in particular, representative action) is an important alternative, given that it also de-personalises the dispute in question.

Collective redress is, of course, relevant only where there are a number of victims of the same breach. Only then is it possible to bundle the claims into a single collective redress procedure or allow such a claim to be brought by a representative body.

Representative action

One of the positive issues identified in the Consultation is the importance of representative bodies. Collective redress by way of representative action by a trade association is an effective and efficient means of dealing with claims from a group of affected undertakings against one specific defendant. It allows savings for the parties involved, increases the efficiency of the judicial proceedings and avoids the need for repeated re-litigation of the same or similar issues. It does not, of itself, facilitate or encourage unmeritorious claims.

Crucially, collective redress via a representative body means that SMEs, in particular, are less likely to be excluded from access to justice as a result of limited financial resources or because of the damage they fear will be done to crucial commercial relationships.

The NFDA encourages BIS to explore measures to facilitate the bringing of representative and collective actions by trade associations on behalf of their members.

Collective redress in the UK

The NFDA understands that, at the moment, US style class actions (where a damages claim is filed with one or several named persons on behalf of a putative class comprising a group of unnamed persons that have suffered a common wrong) are not permitted in the UK. Moreover, the NFDA acknowledges that full US style class actions may not be suited to the UK and the NFDA would, in any event, be reluctant to support a system that was perceived to encourage unmeritorious claims.

There are, of course, a number of ways in which collective action can already be taken before the UK courts, both in general and specifically in relation to damage suffered as a consequence of an infringement of EU and/or UK competition law (see below). However, in the NFDA's view, these existing mechanisms have flaws that could be resolved by an improved system of collective redress/representative action.

Group litigation orders

A representative action may be brought by persons who have the same interest in a claim. This requirement is restrictive and, in general, the preferred (recent) option has been to proceed by obtaining a Group Litigation Order (**GLO**)[3]. A GLO enables individuals with similar claims to take collective action where their claims "give rise to common or related issues of fact or law". However, each claimant must be named individually and within a time period fixed by the court.

While the NFDA might be able to coordinate collective redress using the GLO framework this process has a major drawback as identified in the Consultation, possibly motivated by the fact that claimants are not entitled to anonymity. As mentioned above, an SME with a valid claim may be deterred from taking enforcement action where the defendant is an important commercial partner and where a business crucial relationship may be damaged by court action.

Another key benefit of representative action is deterrence. In other words, a large trading partner may be less likely to impose unduly restrictive terms and conditions over a network of weaker distributors or suppliers if it is aware of the possibility that a trade association (with no direct commercial links to it or dependency on it) could challenge that behaviour. The NFDA agrees with BIS that improving collective redress and facilitating representative action should enhance the deterrent effect of competition law.

Proposals

As a trade association, the NFDA is unable to avail itself of the current Competition Act 1998 (CA98) procedure for representative actions, which is limited to follow-on claims made on behalf of consumers.

The NFDA would like to see the CA98 procedure extended to cover trade associations and their members, enabling trade associations to seek redress on behalf of their members. Indeed, the 'opt-in' system currently in operation in the UK may be suited to the claims that a trade association, such as the NFDA, might seek to pursue on behalf of its members (given that such claims will tend to involve a smaller class of claimants with relatively high value individual claims). That said, the outcome of the Which? replica football kits case, where only a tiny fraction of those that had suffered harm signed up to the action, makes a powerful case for changing the regime from opt-in to opt-out.

On a separate issue, and perhaps contrary to some of the points raised in the Consultation, the NFDA sees no reason why representative actions (similar to an expanded CA98 procedure) should not be extended to other areas beyond competition law. Such a step would not compromise the 'loser pays' principle, which is often seen as a necessary measure to deter abusive litigation.

Of course, this is a matter for the UK government; however, the NFDA urges BIS as part of its wider consultation on collective redress to consider whether implementing a form of representative action for businesses similar to the UK system for consumers would improve access to justice in general, and encourage investment, innovation and other pro-competitive behaviours by SMEs.

[3] CPR 19.11

In terms of assessing which representative entities should be entitled to bring a claim, trade associations could submit to a pre-approval process operated by a competent government body. Alternatively, given the diverse nature of matters that a trade association might wish to cover, the issue could be left to a case-by-case assessment by the courts. This could involve an initial hearing to assess whether the relevant body itself meets the criteria to bring a representative claim in the circumstances which, if successful, would be followed by an application for permission to bring the relevant claim.

Follow-on and/or stand-alone?

The NFDA considers that an effective representative action mechanism, incorporating the principles outlined above, promotes competition and market efficiency by deterring unfair practices, thus serving the interests of UK citizens as a whole. It can work as a useful supplement to public (and individual) enforcement and can incorporate ADR mechanisms. It also benefits defendants in resolving disputes in a more efficient manner.

Such work is particularly important in view of ever more challenging budgetary and resourcing constraints faced by domestic (and pan-European) authorities who fulfil a legal or regulatory enforcement and/or consumer protection role.

Such authorities might, notwithstanding the merits of any complaint, be prevented from taking effective action because administrative and financial priorities dictate that resources are targeted elsewhere. It follows that greater focus on improving access to self-help remedies, whether for consumers or for smaller businesses, can only be a good thing.

With this mind, the NFDA does not see why representative action should be confined to follow-on cases. Although it is clearly useful to be able to rely on a competition authority's decision to pursue a claim for damages, the fact that an investigation does not fit within the authority's administrative priorities should not act as a bar to private enforcement. There is also a deterrence issue at stake where more sophisticated businesses, that are well aware of the finite resources of authorities like the OFT, might adopt a more moderate approach if the possibility of private representative action were strengthened.

Conclusion

The NFDA agrees that improvements to the current system of collective redress – where a trade body, possibly after a proportionate certification exercise, could bring a stand alone or follow-on claim on behalf of member businesses - would enhance the application of competition law in the UK and strengthen the deterrent effect of the UK competition system. In terms of whether such system should be opt-in or opt-out, the NFDA is, given the circumstances of its membership, more neutral; however, it acknowledges the persuasive arguments for an opt-out system in light of Which?'s experience in the replica kits case.

Finally, the NFDA does not consider that enhancing access to representative action would, of itself, give rise to unintended consequences, for example, by leading to anti-

competitive information exchanges. Businesses are, or should be, fully aware of their compliance obligations under competition law and a representative action (particularly where operated by an independent trade association body) should not undermine compliance. In any event, the NFDA agrees with the Consultation that information sharing risks could be appropriately mitigated by the courts via appropriate certification and case management.

The NFDA looks forward to participating further in BIS' Consultation. On a related note, in the NFDA's view, the Government should also look to extend representative action beyond the confines of competition law or, at the very least, explore the possibility of improved regulation and remedies in respect of unfair commercial practices in B2B relations along the lines currently being considered by the European Commission.

Yours faithfully

Sue Robinson
NFDA Director

RWE NPower

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24 July 2012

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

Dear Mr Monblat,

RWE npower welcomes the opportunity to comment on BIS's consultation on private actions in competition law. RWE npower is a major UK energy company producing over 10 % of Great Britain's electricity and supplying electricity and gas to 6.5 million accounts.

We support the approach to improve the application of competition law and redress by providing consumers and businesses both greater ability to pursue private actions as well as increased scope for the utilisation of injunctions where these provide a more appropriate remedy.

In particular by extending the CAT's jurisdiction to hear stand alone claims we believe this has the potential to enhance the prospect for the development of a coherent body of competition law jurisprudence in the UK which will be of significant benefit to its current competition law system.

However, the framework does need to minimise the scope for vexatious or frivolous actions, or indeed unnecessarily fuelling the total amount of potential claims. We do not for example support a collective redress system where victims of a Competition Act infringement are not identified and therefore participate in a litigation process unknowingly but are still bound by the court's decision.

Finally, we would advocate the principle that in assessing the amount of damages for a competition law infringement, the level of redress provided to consumers is an accurate reflection of the actual degree of consumer harm. We also agree that the government should continue to review the impact of a potential passing-on defence and that its actual implementation would be best considered at EU level consistent with current deliberations by the EU Commission on damages actions for breach of the anti-trust rules.

If you would be like to discuss any of these issues further, please contact me.

Yours sincerely

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Sheffield Community Law Centre

Please see below the response for Streetwise Community Law Centre.

<u>Q20</u> 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 think there is significant merit in paying the unclaimed sums to a single specified body set in statute, for the following reasons:

- It would avoid the problem of trying to find a suitable recipient for each case, and the associated lobbying of judges and potential satellite litigation.
- The named charity would receive funds in the public interest and would retain its independence having not been involved in the litigation.
- This would fully deter anti-competitive companies as culpable parties would have to compensate for the total amount of harm as decided by the court, regardless of the number of individuals who came forward to collect their damages.
- The single recipient would receive and use the funds solely in the public interest, acting independently from the parties, their lawyers and the litigation.
- This would preserve legal certainty for all parties and the court, before and during litigation.
- This solution would be administratively simple, saving parties and the court time and costs and thus maximising the funds available from such actions.

<u>Q21</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?

We consider the Access to Justice Foundation as the most appropriate recipient for two main reasons:

The Access to Justice Foundation (AJF) is a trusted national grant maker

- AJF is an independent charity, acting in the public interest to improve access to justice.
- AJF has a trusted role in the advice sector and legal profession, who worked together to establish it.
- AJF'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 advice and pro bono sector to help organisations across England and Wales.
- AJF is able to be uniquely strategic in distributing funds, working with local, regional and national organisations to take account of needs 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.

The Access to Justice Foundation (AJF) supports 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 makes sense that residue damages be used to support further access to justice for the public.
- The advice sector and pro bono sector have an increasingly vital role in providing free legal assistance to those not currently empowered by the law, whether through poverty, social exclusion, or lack of education – just at the time when their abilities are severely impacted by funding cuts.
- 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.

Stephen Mead

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Streetwise Community Law Centre, 28a Beckenham Road, BR3 4LS

Sheffield Law Centre

Please find the response of Sheffield Law Centre to 2 of the questions in this consultation.

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

We fully support the response of the Law Centres Federation and others that money realised as a result of a judicial ruling on unlawful practice should be passed to an independent body that is to act in the public good.

The other options identified in the consultation do not achieve the purpose of seeking at least some redress for those individuals not in a position to assert their own rights individually.

This would, however, achieve the cy-près principles to a significant extent, whilst remaining within the scope of a robust and workable scheme.

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?

Again, we support the response of the Law Centres Federation that the Access to Justice Foundation is the most appropriate body. It is a registered charity and is prescribed charity under section 194 of the Legal Services Act 2007. Its aims match the overall aims of the policy in seeking to provide redress to those who are affected by unlawful practice of the type considered in this consultation paper but who are least likely to be able to assert their individual rights unaided.

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Simmons and Simmons LLP

RESPONSE TO

PRIVATE ACTIONS IN COMPETITION LAW:

A CONSULTATION ON OPTIONS FOR REFORM

24 July 2012

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

The Simmons & Simmons Antitrust Litigation Group welcomes the opportunity to respond to the Department of Business, Innovation and Skills' consultation paper "Private actions in competition law: a consultation on options for reform".

1. General comments

We would like to compliment BIS on a crisp, clear consultation paper that raises the key issues in a thoughtful and focussed way.

Two basic premises underlie our response. The first is that the supreme concept of compensation for harm suffered by victims of competition infringements flows from EU law [1] and must be given effect under English law. We believe that the courts in the UK are fully capable of establishing the relevant loss and the appropriate measure of compensation due in such cases, and that the UK Government should be wary of intervening in well established court procedures except to the extent necessary to give those who suffer damage caused by anti-competitive conduct an effective means of obtaining compensation for the damage they sustain. Second, and in a related point, we are in favour of incremental changes to the legal system that are in line with other developments, such as the Jackson Report, rather than treating compensation claims in competition cases in radically different ways from other types of case. We do not believe that the collective action aspects of antitrust infringements merit fundamentally different procedural approaches from those applying generally.

Specific responses to the questions raised in the paper are set out below.

2. Specific comments

Competition Appeal Tribunal

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

We are in favour of the courts being able to transfer competition cases to the CAT. We do not believe that the concurrent jurisdiction of the High Court and the CAT in private damages actions has worked in practice in the way that the legislators had in mind, with the High Court in recent years becoming the more attractive forum for both stand-alone and follow-on damages actions.

We welcome proposals that will give effect to the Court of Appeal's recognition in *Enron*[2] that "*the interrelationship between the jurisdiction of the court and that of the Tribunal in relation to claims for damages may merit reassessment in the light of experience to date in the use of one type of claim and of the other.*" In our view, the specialist competition tribunal is an appropriate forum to consider both competition claims (stand-alone and follow on), and the competition elements of wider commercial disputes.

We therefore agree that section 16 of the Enterprise Act should be amended to allow civil courts to transfer competition law cases to the CAT. This change would introduce more flexibility in the system, reversing the current trend whereby private damages claims are of necessity brought

[1] Courage Ltd v Crehan: Case C-453/99 (reported: [2002] Q.B. 507); Manfredi v Lloyd Adriatico Assicurazioni SpA: Case C-295/04 (reported: [2007] Bus. L.R. 188)
[2] English Welsh & Scottish Railway v Enron Coal Services Limited ("ECSL") [2011] EWCA Civ 2.

more often in the High Court than in the CAT as well as restoring to the CAT the central role in deciding competition cases that its expertise warrants.

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

We see no reason why the CAT should not be allowed to hear stand-alone cases for damages. The CAT's considerable experience in establishing liability for competition law infringements is sufficient for it to be able to rule on liability in stand-alone actions.

The current system allows only the civil courts to hear stand-alone actions and to establish liability in competition damages cases, and so severely limits the role of the CAT in private damages actions. It seems to us bizarre that the CAT, with its experience in establishing liability on an appeal from a regulator, should not be able to determine liability in private damages actions. If anything, it could be argued that it should be the other way around: the CAT should have jurisdiction rather than the courts.

We therefore agree with the Government that claimants ought to be able to bring stand-alone actions directly to the CAT and that section 47A of the Competition Act 1998 should be amended accordingly.

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

We consider that there may be circumstances when it would be appropriate for the CAT to grant an injunction to a claimant so that the anticompetitive conduct in question ceases. However, we are of the view that the CAT should use the same test that applies in the civil courts when assessing whether to grant an injunction. The power to grant injunctions is intrusive and involves interference with, and disruption to, the activities of a business. It should therefore be subject to a high threshold and used only in circumstances that clearly warrant it.

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

We recognise that for many SMEs, the costs of litigation and the lack of funding may make it difficult to bring private damages actions to the CAT. We understand the concern that SMEs may be more vulnerable to anti-competitive conduct and would require the process to be quicker because they cannot afford to wait for years for a decision, although we think that it would be desirable for work to be done to establish the scope and scale of the SME – specific issues which motivate this part of the consultation.

However, while it is important to ensure that SMEs have access to justice, there must be safeguards in place to ensure that a fast track route cannot be abused by SMEs to bring unmeritorious claims. For that reason, we do have reservations about the CAT having power to grant swift interim injunctions to claimants on a legal basis that is any different from the general test for the grant of injunctions, applied of course to the facts of the case including the position of the SME claimant.

We think that the CAT should be given greater discretion to deal with cases brought by SMEs and it should be encouraged to make decisions on issues such as cost capping on a case by case basis. For the reasons set out in the consultation document, we do not consider it appropriate for the CAT or OFT/CMA to write to the alleged infringer at the beginning of the fast track procedure.

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

We consider that costs thresholds are appropriate in these circumstances. In relation to damage capping, we are of the view that it would be very difficult to decide what a suitable maximum damages award would be, as this would depend entirely on the circumstances of each individual case.

In relation to injunctive relief, we refer to our response to question 3 above. While we recognise that SMEs are likely to need a quicker process and therefore there may be circumstances where an injunction would be the more appropriate remedy, the CAT should require the SME to provide sufficient evidence of anti-competitive conduct. Injunctive relief is an intrusive remedy, which in many cases will have an impact beyond the immediate parties, and should not be used lightly, even if the claimant is an SME.

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.

Quantifying loss

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 purpose of private actions for damages should be strictly limited to compensating victims for the losses which they have suffered as a result of anti-competitive behaviour, as stated by the Court of Justice of the European Union (ECJ). Establishing a rebuttable presumption of loss undermines that principle. In addition, English Courts are well able to determine levels of loss which have been suffered and have the experience and tools available to them to do so.

Introducing a rebuttable presumption may in fact complicate and lengthen proceedings as there may well be a preliminary debate about the rebuttable presumption before addressing the question of the actual loss suffered. We are concerned that a rebuttable presumption might lead to further satellite litigation as the precise parameters of the presumption and its application are worked out by the Court or the CAT, as has occurred with many of the CAT Rules over the last decade.

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 persuasive case for directly addressing the passing-on defence in legislation.

The existing principles of English law should be sufficient to address the issues which arise in this area. Private actions for damages should compensate the legal persons that have suffered loss caused by anti-competitive conduct. Further, the principle of *non bis in idem* is a fundamental principle of our legal system. Introducing any legislation in this area would in some circumstances either have the effect of precluding a victim from obtaining redress, an outcome which we consider would be unfortunate, or unjustly penalising a defendant by enabling claimants to recover losses which they have not in fact suffered.

In the absence of legislation, the standard principles of English law should apply. This means that it is for the individual claimant to prove its loss. If a claimant has not in fact suffered a loss or the defendant is able to show that the loss has been passed on, then it is only right and proper that the claimant should not be able to recover for a loss which it has not suffered. This is intrinsic to the purpose of the claim being strictly limited to compensation for loss suffered.

Collective Actions

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

We recognise the limitations of the current system for delivering the compensation mandated by European law for harm caused through competition law infringements. These include the parameters set for cases under section 47B Competition Act before the CAT, the limitations of Rule 19.6 CPR for use where the claimants constitute an identifiable group only by virtue of having suffered the losses in question, the difficulties of constituting a group that involves both direct and indirect purchasers, and the low overall take up rates for participants in actions consolidated under Group Litigation Orders.

However, we are equally alert to the risk that the discussions on introducing collective actions are confusing two distinct enforcement strands, namely deterrence and compensation. In our view, deterrence belongs properly in the sphere of public action and compensation in the sphere of private actions for damages, except to the extent mandated by case law as to the very limited circumstances in which exemplary damages may come into play. That an effective system of redress for those who suffer as a result of anti-competitive behaviour may have a deterrent effect is logical, but peripheral to the question of how best to design such a system. We are therefore wary of steps to expand the collective action regime that would blur the distinction, and prefer an incremental approach, with sufficient checks and balances incorporated to ensure that punitive elements do not seep into the arena of compensation. In practical terms, we therefore have some reservations about introducing a pure opt-out regime. However, we are of the view that the dangers of such a system can be managed if it is introduced and tested in an incremental fashion, first addressing those areas of most need; consumers and small businesses.

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.

In our view, the policy objectives for strengthening the collective action regime should be couched in terms of stating the overriding purpose of securing compensation for loss. If we infer that the policy objectives are to deliver "restorative justice for consumers and small businesses" then it would perhaps be clearer to adhere to the terminology used by the court, namely compensation. We fail to see, other than in the broadest sense, why the element of deterrence is introduced in question 10 (please see our comments in Q.9 immediately above).

In our view, the Government is correct to identify as key the requirement to strike a balance between the need for an effective system for collective action claims and the need to protect defendants from having to settle unmeritorious claims (paragraph 5.6). We also recognise that small businesses have much in common with individual consumers in terms of disincentives to seek compensation, and from that perspective, acknowledge that if measures are taken to facilitate compensation claims from consumers, they should also apply to small businesses.

However, we note that the Government proposes to extend the collective action regime to permit them to be brought on behalf of all businesses. This is a large and radical step to resolve the malady identified, namely the inadequacy of available procedures for small businesses to secure

redress. If the issue identified is one relating to small businesses, then the proposals should define what is meant by a small business, and set out a solution framed to resolve those issues for that group. We query whether this radical step is justified at this time, although we see some justification for small claims by larger businesses to be treated in the same way as small claims by consumers and SMEs, as we discuss below (question 14).

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

We accept that consumers are particularly disadvantaged by the challenges of bringing a compensation claim for loss caused by antitrust infringements, and to the extent that these disadvantages are shared also by small businesses, see the logic of applying similar provisions to both. We are not convinced of the need to grant equal standing to larger scale businesses fully capable of litigating or otherwise resolving commercial disputes with their business partners. The proposition that collective actions by businesses in general (or representative actions – the indiscriminate use of terminology, as here, in paragraph 5.10, makes it somewhat unclear what claims are being provided for, and for what types of action) should take on the role of deterring other businesses from breaching the competition rules appears to us to be particularly questionable. That seems to us, if it is an objective, to fall the wrong side of the balancing line. In our view, changes to the regime should be focussed on making compensation for harm more easily available, not on strengthening deterrence in order to bolster the public enforcement regime. In any event, if compensation is correctly identified as the overriding purpose of the reform, then additional deterrence by way of large businesses claiming through collective actions appears unnecessary.

However, in circumstances in which larger businesses have, in fact, made modest individual losses similar in size to those of consumers and SMEs, they could, as we suggest below (question 14), be given the option to seek redress together with consumers and SMEs in a collective action.

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

We do not see that special measures are needed, as lawyers will be involved.

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

As a matter of practice, the budgetary constraints ('administrative priorities') of the OFT/CMA will mean that not all cartels that come to its attention will be investigated. Victims of those cartels are nonetheless entitled to compensation under EU law. Additionally, cases in the High Court indicate that damages claims may have both standalone and follow-on elements even after a decision has been made. Furthermore, claims are being brought whilst investigations are ongoing in order to ensure that limitation periods are not exceeded and that cases are not more drawn out than necessary, and to that end must currently be brought in the High Court. Given that we agree that the CAT is the appropriate specialist venue for actions for antitrust damages, and should be allowed to hear stand-alone cases, and that collective actions should be permitted at the CAT's discretion to consumers and small businesses, it follows logically that the CAT should be permitted to certify standalone collective actions as well as follow-on cases where appropriate.

However, it remains the case that without a previous finding, or at least ongoing investigation, the existence of any serious cartel will in reality be difficult for either collective or individual proof. From that perspective, therefore, the vast majority of claims will continue to be follow on rather than standalone. If collective stand-alone claims are permitted, this is likely to mean that even where an investigation is underway, a standalone action is likely to be launched in the first place

pending resolution of the investigation on which a follow on claim can then be based. This is likely to bring about a shift in the timings and pleadings in damages claims in the CAT.

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.

There are significant fears amongst the business community that the advent of an opt-out regime would trigger rapacious speculative and unmeritorious claims, pressuring the defendant either to settle or to face considerable outlay to redeem its name and defeat the claim. In our view, introducing an opt-out collective action regime geared to consumers and SMEs rather than all businesses, as a first step, may allay some of those fears. The proposed opt-out regime undoubtedly requires a significant departure from the traditions of the UK legal systems. If, as it appears, the Government's chief concern is to ensure that consumers, whose losses may be small, and small businesses, who may be disproportionately affected by competition infringements, are able to secure redress more easily, then an initial step of this kind would address the most pressing need to provide for adequate redress, whilst avoiding the anticipated excesses of a full-blown opt-out system.

The Government is, in our view, correct in identifying at paragraph 5.29 the factors that should prevent abusive actions being brought. In particular the rejection of any form of multiple damages, together with the maintenance of the "loser pays" costs shifting rule, make the landscape very different from that in the USA. We comment on the practical issues surrounding costs awards below at question 17.

The Government could also give consideration to an upper limit on the measure of damages sought by an individual claimant within the class. This would enable larger businesses that have incurred only a small loss from an antitrust infringement, to join others with small losses in a collective action in to seek redress, and so not discriminate against larger businesses merely on the basis of size. The upper limit could be fixed as an overall ceiling, reviewable from time to time by the Secretary of State, or else be fixed on a case by case basis by the CAT as part of the exercise of its discretion in certifying the claim.

Once the system had bedded in, it would be possible to see whether the safeguards built in are indeed sufficient to prevent its abuse and if appropriate, the regime could be further expanded to include all businesses. This could be done by way of a provision in the relevant primary legislation which, in the first instance (as was the case with s.16 of the Enterprise Act 2002) is not brought into effect, to avoid the need for further primary legislation.

We agree that the CAT is the appropriate (exclusive) forum for collective actions for antitrust damages to be brought, and that the Tribunal should have discretion to determine whether the case is an appropriate one to be brought in this way. Clear guidance should be published as to the factors to be considered when deciding to certify a collective action to proceed, including ensuring the availability of funds to pay the defendant's costs should the claim fail in whole or in part.

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

The list of issues to be considered on certification set out in Appendix A is sensible in its scope and identifies the key issues. The list does not seek to state where the line should be drawn on some issues. For example, sufficient commonality of interest amongst the claimant group is obviously necessary, but the question arises whether ultimate consumers should always have to form a separate group to those further up the supply chain who may have passed on any additional cost, or at least a part of it. The list also does not suggest a suitable minimum number of claimants for a collective action. These issues will need to be addressed.

The proposed preliminary merits test may in practice prove little more than a final detailed check as to the prospects of the action if, as we assume, the requirement for the representative of the group to have sufficient resources to cover the defendant's costs if the claim is unsuccessful will require the involvement of a funder. Before risking their capital, funders will be careful to assess the merits of the claim and will usually require an independent assessment of its prospects giving it a chance of success that is significantly above 50%. In practice, if the CAT applies the test proposed "that there is a reasonable possibility that material issues of fact and law common to the class will be resolved at trial in favour of the [claimants]", the prospects of the claim will be held to a lesser standard than that of funders. For the tribunal to decide the question posed (drawn from the Ontario Law Reform Commission Report), it will inevitably need to assess a reasonable amount of evidence that will subsequently have to be considered again in any ultimate merits hearing. However, we would not wish to dispense with the additional protection provided by the CAT assuring itself of the merits of an action, despite our reservations about the potential duplication involved.

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

Yes – we believe that the prerogative for punishment should remain within public enforcement. Furthermore, it should be noted that treble damages in the United States are awarded without interest. Here, depending on the interest rate at the time, awards of interest on top of single damages may come close to the headline treble damages awards made in the US.

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

We are very much in favour of maintaining the loser-pays principle for any form of collective action, given that it acts as a deterrent and constitutes an important check against abusive litigation. Any form of collective redress introduced without the loser-pays principle would give rise to a situation in which the incentives for speculative and/or abusive litigation are prominent. We note the perception that because there is considered to be no effective downside or deterrent to the bringing of unmeritorious claims in such a system (other than the claimants' own costs), unmeritorious claims may be framed in order to extract from a defendant a settlement (of which a disproportionate amount is then paid to the claimant's lawyers). A corporate defendant that finds itself faced with the prospect of a large antitrust claim in such a system knows that, regardless of the view it takes of the merits of that claim, it will face a potentially onerous and expensive pre-trial procedure, especially if wide ranging disclosure is ordered. Faced with the prospect of such litigation, there is a commercial incentive to settle, regardless of the merits of the claim being brought. That does not appear to us to be in the interests of the effective enforcement of competition law and the creation of a system in which the rights of both claimants and defendants are adequately safeguarded. That said, we are open to some discretion being exercised in appropriate cases in the interests of access to justice, as set out in question 18.

One issue that is not discussed in the consultation paper is the fact that it will be very rare for a representative of a group of consumers or small businesses to have sufficient capital to cover a potential costs award in favour of the defendant. Furthermore, there is no incentive for a representative to voluntarily take on such potential liability when bringing a claim on behalf of a wide group of injured parties who will share the damages awarded if the claim succeeds, but bear none of the costs should it fail.

In reality this means that the representative will require After The Event (ATE) insurance to cover the defendant's costs should the claim fail. The premium for such a policy will usually increase the further the case progresses, but can commonly amount to 60% or more of the projected costs of the defendant if the matter goes to trial. Few individuals or small businesses will be able to afford this, particularly as the recoverability of this premium from the defendant if the claim succeeds will end in April 2013 under the reforms formulated by Sir Rupert Jackson. This will see the end of policies where the cost of the premium is covered by the policy, allowing cover to be

obtained at zero cost to the claimant. Even those representatives who can afford to buy ATE cover will have no incentive to do so where the risk is not shared amongst the rest of the group, as discussed above.

The only way that ATE cover will be accessible to a private representative bringing a claim will be to involve a third party funder and we foresee that the "loser pays" rule will mean that such a funder would be involved in every representative action under the contemplated regime. Funders work on differing models, some requiring a percentage of the damages obtained, some requiring a fixed return on capital that rises depending upon how long the case takes to reach resolution. Given that this is a relatively new, and high risk, form of investment, at present the returns sought by funders are high, reflecting the fact that they are commonly established by hedge funds seeking extraordinary returns for investors through innovative strategies. As a result, members of a claimant group will see a significant part of their damages deducted to cover the costs of the funder. There is nothing particularly objectionable in this model, given that the alternative is that no redress would be possible at all, but it must be recognised that this is a logical implication of the application of the loser pays principle to representative actions.

We consider that placing the funder at risk of the defendant's costs is necessary both to ensure that a successful defendant can recover its costs (the representative being unlikely to be able to meet these) and to act as a deterrent against abusive actions. In order to adequately protect defendants there must be no possibility of a funder being able to avoid liability for a successful defendant's costs on the basis that the funder was misled by the claimants. This risk must lie with the funders, who are in a position to assess any claim that they consider funding and to buy ATE cover.

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?

In terms of (a), we are fundamentally of the view that the court before which the proceedings are brought is in the best position to ensure that any award of costs is fair, reasonable and proportionate. We note that the Competition Appeal Tribunal has considerable discretion under rule 55 of the Tribunal's Rules to make any order it thinks fit in relation to the payment of costs by one party to another, may determine how much the party is required to pay, and may take into consideration the conduct of the parties in relation to the proceedings. It has significant experience of exercising this wide discretion in determining appropriate costs according to the merits of the case and there is no reason to think that if its jurisdiction were extended to include deciding collective action, it would do anything other than continue to weigh the competing interests of claimants and defendants carefully.

The reforms formulated by Sir Rupert Jackson include provisions for "qualified one way cost shifting" in personal injury cases to be introduced in April 2013. In claims where this applies, a defendant could be liable for the claimant's costs if the claim succeeds, but the claimant would not be liable for the defendant's costs if the claim fails unless the claim was fraudulent, or the claimant rejected a settlement offer made under CPR Part 36. While a similar scheme in the case of representative actions may seem attractive, and would reduce the amount deducted from damages to pay for third party funding of ATE cover, it has the real risk of introducing "without risk" litigation and unfair pressure on defendant companies to settle regardless of the merits, as the considerable legal costs of defending the claim would be irrecoverable regardless of the outcome.

We are not in favour of the claimants' costs being met out of a damages fund, being of the view that the damages fund itself should comprise only the compensation sums due to victims. defendants who resist settling well founded claims should be exposed to the risk of paying the claimants' costs in the same way that claimants who pursue ill-founded claims should be at risk of paying the defendants' costs.

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

No. Contingent fee arrangements will be permissible in all forms of civil litigation from April 2013 under the reforms formulated by Sir Rupert Jackson. It would be odd to make an exception for group actions, where there would be a real benefit in allowing such an approach. It has to be understood that if group actions to obtain compensation for anti-competitive behaviour are to take place, someone must be incentivised to take the risk of funding them. A group that will only be defined late in the process cannot be liable for the costs of the case and it is therefore necessary to create incentives for others to fund the costs. Permitting lawyers to charge fees based on the outcome of the case is an alternative to "pure" litigation funding as set out above. We believe the use of contingent fee arrangements by lawyers may be appropriate in collective redress actions if properly regulated. Contingent fee arrangements could provide an incentive for lawyers to support collective redress claims that might not otherwise be possible for claimants to bring. Unsuccessful claimants would still be liable for the defendant's costs, which would need to be covered by ATE insurance paid for by the lawyers or a third party funder.

Cy-près

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

In general, we do not believe that the principles of compensation established by the ECJ justify additional payments other than to those harmed by a competition law infringement. In our view, the quantified damages payable to those harmed by an infringement should be equivalent to the compensation claimed – that is, there should not be a residual sum that requires distributing. We regard it as abusive for individuals to profit beyond the measure of their loss. For there to be a mismatch between those entitled to claim and those who are compensated seems to us to be wrong in principle.

Of the options set out in the proposal, we consider that Option C (reversion to the defendant) is the most appropriate option. We would qualify this by stating that the funds should revert to the defendant once steps have been taken (as stipulated by the Court or the CAT) to locate potential claimants who may not yet have joined the class and once the claimants' costs have all been met. At that stage, though, if the claimants do not come forward to claim damages, then all of the other options strike us as essentially being further punishment for the defendant which may already have either been fined or been exposed to the possibility of a fine had a competition authority taken action against it.

Turning to the other options and the shortcomings with them:

Cy-près

We have reservations about the cy-près proposal, as it is inherently uncertain and we question the justice of forcing a defendant to pay sums to an entity the identity of which cannot readily be determined at this stage of the proposal and which will always remain uncertain into the future.

Funds to the Treasury

We consider this to be tantamount to a form of double-penalty or taxation as noted in the proposal.

Distribution to a named scheme

If the funds are not to be returned to the defendant, then we consider this the most appropriate solution given the certainty which can be outlined in legislation at this stage as to the objective to which the funds will be put.

Claimant-sharing

We consider this would be tantamount to a form of unjust enrichment which, therefore, should not be pursued.

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.

Standing

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

We consider that the ability to bring opt-out collective actions should be granted to private bodies rather than solely to the competition authority. In fact, we do not consider that it should be granted to the competition authority at all. The role and function of the competition authority should be kept separate and distinct from the pursuit of private actions for damages. We consider that private actions for damages should be just that - private. Competition authorities have an important public role to fulfil. However, if redress is to be obtained, then seeking that redress should be left to claimants and those who act for them.

We also note that public authorities have different agendas and different funding requirements. Placing the responsibility for bringing collective actions on public authorities risks not only diverting their resources but also restricting the freedom of claimants, and those who represent them, to bring claims in cases which they consider meritorious.

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?

If a scheme for collective actions is to be introduced, then we do not consider that it should be restricted only to those who have suffered harm and genuinely representative bodies. The experience of the last decade, as noted in the proposal itself, shows that representative bodies may not be best placed to pursue redress on behalf of claimants.

ADR

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

As part of the wider Simmons & Simmons' international dispute resolution group, members of the Antitrust Litigation Group are strongly in favour of using ADR where appropriate, with the ultimate backstop of recourse to the courts if necessary. However, we have reservations about making ADR a mandatory step in a collective court case for compensation for antitrust harm. Such a requirement could impede access to court and, if it were to result in additional costs and/or a lengthier procedure, would restrict the effective judicial protection to which an individual is entitled under Article 6 ECHR. We also have concerns about the effectiveness of multiparty mediation proceedings. We note also that important substantive and procedural aspects of private damages claims have yet to be ruled on by the courts. We therefore support the proposition that ADR should be further encouraged, but by no means made a mandatory prerequisite to litigation.

Procedures

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 serve a useful purpose in encouraging parties to set out their case prior to bringing an action and affording parties an opportunity to consider whether there are means of resolving their dispute other than through the issuing of proceedings. They have become a feature of the litigation landscape in the years since the Woolf reforms. We consider that the same principles could usefully be applied in all of the above proceedings in the CAT.

However, some judicial flexibility and discretion will be required in cases involving an international element. This is because of the well-known risks of "Italian torpedo" actions and the pre-emptive seising of jurisdiction in other countries in order to thwart a claim in the English Courts of which, in line with a pre-action protocol, a defendant has been put on notice.

Accordingly, any costs sanctions for the breaches of pre-action protocols should be limited and/or waived in appropriate cases. The inherent judicial discretion on questions of cost should provide the necessary flexibility to address those issues as and when they arise.

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

Given the proposals at Question 1 above regarding the amendment of Section 16 of the Enterprise Act and the possibility of the Courts transferring competition law cases from the High Court to the CAT, we consider that there may be some merit in aligning the rules on formal settlement procedures between the CAT and the High Court. Otherwise, complications could arise if formal settlement offers have been made under High Court procedures before transfer to the CAT.

In addition, we note that there have been a significant number of cases and clarifications of the Part 36 regime in the High Court. To the extent possible, we would suggest that the CAT rules follow those of the High Court.

Mass settlement

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 not agree that in these circumstances there will be no need to make separate provisions for collective settlement in the field of competition law. Instead, we would note the success of the collective settlement mechanism in the Netherlands and consider that the UK could usefully adopt the best elements of that regime.

Miscellaneous

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?

Generally, we believe that competition authorities should be reluctant to become involved in securing compensation, given that redress can be obtained through the courts. That said, we recognise that there are instances where significant harm is suffered by consumers as a whole, but the loss to each individual is relatively small, where such a scheme may be of assistance. We think the need for such schemes would be significantly reduced if opt-out actions are introduced.

We note that it is not intended that the OFT/CMA would itself attempt to quantify the loss (paragraph 6.39), but would simply set out the types of redress to be provided and direct how to calculate the redress. We suggest that guidance on these issues would be useful to assist companies to formulate their own voluntary redress schemes and to provide potential claimants with a framework to negotiate compensation even if the competition authority is not given the power to implement or certify a redress scheme. We feel that, in particular, in cases where claimants would not be likely to obtain remedies by other means, the OFT/CMA should treat provision of redress as a mitigating factor which can reduce the level of fines (see below).

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

We think that it is important as a matter of principle to separate issues relevant to compensation from issues relevant to punishment. A company that engages in anti-competitive behaviour should both pay a fine and make appropriate redress to those suffering loss because these elements pursue separate aims. We do not see a compelling argument that a company should receive a reduced punishment simply because it has made redress, where it is anyway obliged to do so.

However, there is an argument that the voluntary implementation of a redress scheme may in some cases be the only likely means of those injured receiving any redress, as well as saving potential claimants time and expense in seeking redress through the courts. This may merit a reduction in circumstances where the scheme is entered into voluntarily before claimants have incurred any significant cost in seeking to obtain redress and where it provides claimants with a clear indication of how that compensation will be calculated.

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 an extended role for private actions complements the deterrent effect of penalties imposed by public authorities and view this as important given the limited resources of public

authorities. We reiterate that private redress and public enforcement achieve separate (but complementary) goals. The former allows effective redress for victims of anti-competitive behaviour while the latter sanctions such behaviour.

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 European Commission and OFT have both clearly stated the importance of leniency programmes in detecting and preventing cartels. The continued success of leniency programmes requires companies to have sufficient incentives to seek leniency and, for that reason, we think that leniency applicants should not put in a worse position vis-a-vis private claimants than undertakings that do not cooperate with competition authorities. Accordingly, we are in favour of protecting documents which were created solely for the purpose of being granted immunity or a reduction in fines under an EU or national leniency programme. In our view this would include Corporate Statements and responses to requests for information where that request was related to information first provided in a leniency statement. Further, we think it important to protect extracts from Corporate Statements whether contained in Statements of Objections or in confidential versions of final decisions.

In our view, this is unlikely significantly to undermine the right to effective redress. Claimants will be able to access underlying documentation, including exhibits to Corporate Statements, through standard disclosure and will also be able to rely on the non-confidential version of a decision. Corporate Statements and other leniency submissions are unlikely to provide claimants with significant assistance in proving causation and loss as their central relevance is to the issue of liability, which is already established in a follow-on damages case. We think the potential harm to leniency programmes outweighs the marginal benefits that claimants may obtain from accessing leniency documents.

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 think there is a strong argument for protecting whistleblowers that have been granted immunity under a leniency programme from joint and several liability. This provides a further incentive to seek leniency. It also reduces the probability that an immunity applicant will be exposed to private damages claims on behalf of all its co-cartelists who are contesting liability and against whom private actions must be stayed.

In our view, however, the interest in protecting whistle-blowers is less strong than the right of a private claimant to secure full redress. Accordingly, in the unlikely situation that the whistleblower is the only solvent member of the cartel able to pay damages, it should be required to do so.

We do not think it is necessary to protect other leniency applicants from joint and several liability. Whilst, by definition, they provide significant added value to the public authority case, their contribution in terms of uncovering cartels is clearly less significant. Further, the more companies that are immune from joint and several liability, the more likely it becomes that the remaining companies will be unable to pay damages in respect of the entire loss and that either claimants will be unable to recover their full loss, or that courts will be required to re-impose joint and several liability on leniency applicants on an ad hoc basis. This is neither necessary to protect incentives to seek leniency, nor desirable.

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

We do not consider it necessary to introduce other measures to protect the public enforcement regime at this time. We believe that reforms should be incremental and undertaken only where there is a clear risk to public enforcement. We do not think it necessary or desirable to prevent an English court from taking decisions that run counter to a ruling by an NCA or review court. The English courts are well able to judge how much weight should be accorded to such decisions.

Simmons & Simmons LLP
Antitrust Litigation Group **24 July 2012**

Skadden, Arps, Slater, Meagher and Flom LLP

Skadden

RESPONSE TO

DEPARTMENT OF BUSINESS INNOVATION & SKILLS

PUBLIC CONSULTATION:

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

July 24, 2012

I. INTRODUCTION

The Antitrust and Competition Group of Skadden, Arps, Slate, Meagher & Flom LLP ("Skadden Antitrust") appreciates the opportunity to comment on the UK Department for Business Innovation and Skills ("Government") consultation entitled *Private Actions in Competition Law: A Consultation on Options for Reform* (the "Consultation"). Skadden Antitrust has extensive experience with antitrust litigation in the United States – generally defending corporate interests. We therefore believe we are well-positioned to comment on the Consultation's proposals in the context of the US litigation system and to identify some of the drawbacks of the US system that the Government risks importing through the proposed reforms, notwithstanding the Consultation's stated goal of avoiding this result. We also note, where appropriate, some of the positive aspects of the US system.

In our experience, given *any* economic incentive, the US plaintiffs' "industry" will find a way to exploit the features of the system, whether individually or in combination, and whether substantively or procedurally. The enormous financial exposure created by the US litigation system, particularly the opt-out class-action system, can give plaintiffs' lawyers tremendous leverage to coerce settlement of unfounded or overbroad claims. In addition, such exposure can affect the public enforcement regime by discouraging leniency, in turn allowing anticompetitive conduct to go undiscovered.

Given our experiences, our response speaks to the Consultation's aims of "ensuring that any changes to the regime do not create a disproportionate risk of exposing businesses to vexatious or spurious claims" and "maintaining the public competition authority at the heart of the enforcement regime."[1] We respectfully assert that the introduction of an opt-out collective action, a rebuttable presumption of loss for cartel damages, and a broad emphasis on bolstering private actions may well foster abusive litigation practices and erode the public enforcement regime in the UK, despite the Government's hopes to the contrary.

[1] Consultation, §§ 3.15, 3.16, at pp.11-12.

II. OPT-OUT COLLECTIVE ACTIONS INCREASE THE RISK OF ABUSIVE LITIGATION

The Consultation's proposal to introduce opt-out collective actions is accompanied by the proposition that there are key differences between the US and proposed UK regimes that should prevent the proliferation of US-style abusive litigation practices in the UK.[2] While commending the various elements of the UK regime designed to suppress unmeritorious suits, we believe that the mere act of allowing opt-out collective actions will open a Pandora's Box. The Government should consider that avoiding the *particular* characteristics of the US system will not necessarily avoid providing the plaintiffs' bar with the financial incentive and ability to bring unmeritorious or overbroad lawsuits in the UK with the purpose and effect of reaching unwarranted financial settlements.

The following sections describe how various aspects of the US opt-out class-action regime can fail to deliver outcomes based on the underlying merits of a claim and discuss each of these aspects in relation to the Consultation's proposed reforms.

A. Opt-out collective actions enable claimants to subject a defendant to tremendous financial exposure by the mere filing of a claim.

Under the US system, a single "named" plaintiff or handful of "named" plaintiffs may bring a suit on behalf of a designated class or classes of potentially thousands – or millions – of other purported class members, with the immediate effect of exposing defendants to massive damages in the aggregate regardless of the merits of the underlying claims.

The same plaintiffs' attorneys tend to be repeat players in US antitrust class-action lawsuits. Also, the "named" plaintiffs very often are not actively in control of the action, but instead are primarily directed and controlled by the class-action attorneys. Thus, the nominal plaintiffs essentially are a vehicle for entrepreneurial attorneys to bring an action that can then be leveraged to force large settlements with defendants who cannot afford (or wish to avoid) the cost, time, distraction, and tremendous financial exposure inherent in an open-ended "opt-out" class-action, regardless of whether or not the action is weak or strong, meritorious or

[2] *Id.*, § 5.31, at p.34.

unmeritorious, broad or narrow. Often overlooked is the fact that the US litigation system encourages plaintiffs' attorneys to bring overbroad claims to increase their claimed damages and leverage to force higher settlement terms. Such overbreadth can include the expanding of the time period of an alleged violation, the products included, the participants, the victims, and so on.

The opt-out mechanism in the US promotes a system wherein plaintiffs' attorneys have a substantial economic incentive – and the ability – to bring class-actions without regard to the strengths of their underlying claims. Such suits expose defendants to tremendous damages in the aggregate by the mere filing of a putative antitrust "class-action." In fact, the opt-out system has the ability to magnify the litigation to the point that it no longer matters to the defendant whether the claim is overbroad or not, or even meritorious or not.

There is no question that an opt-out system improves access to the courts, however the claimants are part of the litigation by default and in the end the compensation may not reach the victims. There is also no question that when plaintiffs' attorneys can bring cases on behalf of a class of claimants in an opt-out system, the plaintiffs' attorneys immediately wield great power. This great power is easily abused.

In our opinion, the UK should maintain an opt-in system. If, however, the UK were nevertheless to move to an opt-out system, we are in agreement that the "question of who is allowed to bring cases is critical to the design of a collective action regime."[3] As the Consultation recognizes, "the dangers that could arise where the interests of lawyers or of the representative body diverges from that of the individual consumers or businesses that have suffered harm" and that it "has no wish to create a so-called 'litigation culture'."[4] Along these lines, the Government takes the position that opt-out collective actions "could only be brought by bodies that could reasonably be considered as representative; in other words, either a party that has itself suffered harm or a body that could reasonably be considered to represent the wider interests of those who have suffered

[3] *Id.*, § 5.34, at p.35.

[4] *Id.*, § 5.53, at p.39.

harm, such as a trade association or consumer group, rather than by legal firms or third party funders."[5]

Although representative actions are in theory preferable to US-style class-actions involving plaintiffs' attorneys, we note that giving standing to any private entity – even a not-for-profit entity – may nevertheless raise the specter of abusive, unmeritorious or overbroad litigation. First, a representative trade association or consumer organization, even as a not-for-profit entity, may still have a motive to bring actions for the purpose of raising revenue. In addition, such organizations may have non-financial agendas and/or motives for bringing collective actions that are not consistent with the Government's goal of avoiding abusive litigation. As we have noted with respect to the US system, it is not the *particular* characteristics of the US system, but rather the incentive and ability *underlying* that system that leads to abuse.

We also note with respect to representative actions that, to the extent a representative action could encompass the claims not only of identified but also of "identifiable" individuals, it would present the same risk of abusive litigation as the opt-out system in the US. Such a system would allow a collective action to sweep up the claims of literally countless unnamed persons who have not affirmatively signed onto the litigation. This in turn would create the financial *ability* for the representatives to generate tremendous pressure on a defendant or defendants to settle in light of the magnified claims for damages from thousands or millions of additional unidentified persons – a pressure that is entirely independent of the merits of a claim. The use of trade associations or consumer groups as representative entities would tend to avoid the "abusive litigation" risks of the opt-out class-action device only if such entities were strictly regulated.[6]

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[5] *Id;* We agree that third-party litigation funding may present a similar financial incentive to bring unmeritorious actions.

[6] The Government proposes a preliminary test analogous to the US class certification standard, using the requirements of numerosity, commonality, typicality, and adequacy. Recent US Supreme Court jurisprudence has strengthened a rigorous analysis of those requirements. *See Wal-mart Stores v. Dukes*, 131 S. Ct. 2541 (2011). We note that the Government has omitted the additional important US certification requirement of "predominance," Fed. R. Civ. P. Rule 23(b)(3), which also performs an important

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If certification is relatively easy to obtain for UK representative entities bringing opt-out collective actions, there is the danger that such entities would bring unmeritorious suits and/or that such entities would be formed and controlled by others (e.g., plaintiffs' attorneys) in order to gain access to the collective redress device as a means to pursue economic or other non-merits-based interests. Such an "end-run" could result in importing various abusive features of the US class-action system – or other features with the same end result – into the UK.

We agree with the Government's recommendations that only representative private bodies be granted standing if the UK moves to an opt-out collective action system. We would further suggest, however, that the exclusive use of public bodies akin to the Danish Ombudsman to prosecute such actions presents far less risk of litigation abuse than class-actions or representative actions. Designated public officials are much less likely to be financially motivated to bring suit, and would be more likely to promote the interests of injured parties as opposed to the financial interests or the policy agendas of private representative entities. Furthermore, the creation of a robust mechanism allowing private persons the right to petition the designated public authority to pursue meritorious competition claims would protect against the creation of a litigation culture in the UK while addressing the Government's fear that a public collective action approach "might be seen as an unfair and inappropriate limitation of individuals' civil rights of action." If the Government ultimately were to implement an opt-out collective action, we respectfully submit that the right to prosecute such actions should fall exclusively to public authorities.

Before recommending the introduction of an opt-out collective action, the Consultation highlights the characteristics of the opt-in system that is currently in place.[7] We note that both a "pure opt-in" and "pre-damages opt-in" system are the least likely to result in the kinds of abusive practices the US opt-out system has wrought. We are leery of any system in which a private person would have standing to bring an action for collective redress

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gate-keeping function. We thus respectfully suggest that the Government consider adding this requirement to any class-certification test.

[7] Consultation, § 5.15, at p.30.

of unnamed individuals. The creativity of the US plaintiffs' bar to exploit *any* system that presents *any* incentive or ability to bring unmeritorious, overbroad or weak cases suggests the need for a system that gives standing to bring collective redress actions only to a public, governmental entity. We therefore recommend retention of some form of "opt-in" collective action in the UK, or at the very latest limit the right to bring a collective action to public authorities.

B. Treble damages result in overcompensation.

Under the US system, plaintiffs in antitrust class-actions are entitled to an award of treble damages. The Consultation recognizes that the Government must avoid adopting this sort of punitive private damages regime.[8] The Consultation also notes the risk that treble damages will motivate a "'litigation culture', in which claimants are able to bring speculative cases and defendants are forced to settle simply to avoid the risk."[9] Finally, the Consultation rightfully highlights the fact that treble damages "provide an incentive for cases to be presented as competition cases even if they would more accurately be classed as contract law cases, simply so that the claimant can benefit from the treble damages available."[10]

We commend the Government for its position on treble damages. Nonetheless, we do not believe that rejection of individual aspects of the US system will change the underlying incentives to bring abusive litigation present in any opt-out regime. It is the aggregate characteristics of such a regime, in form or substance, that lead to litigation abuses and coerced settlements notwithstanding unmeritorious or overbroad claims.

C. The absence of two-way cost shifting promotes spurious actions.

In the US, cost shifting is a one-way street. If a defendant prevails, then the parties bear their own attorney's fees and costs. If the plaintiff prevails, then the defendant must pay the plaintiffs' attorney's fees and

[8] *Id.*, § A.6, at p.56.

[9] *Id.*, § A.5, at p.56.

[10] *Id.*, § A.6, at p.56.

costs. Thus, plaintiffs have no disincentive for bringing a weak or unmeritorious claim. This regime divorces the incentives to bring class-actions from the merits of the underlying claim, as plaintiffs' attorneys are not forced to factor in the potential costs of losing in deciding whether to pursue a case. The Consultation rightfully recognizes that the loser pays principle is "one of the most valuable safeguards" against frivolous or unmeritorious claims and that "it is critical that the loser-pays principle should be maintained."[11] We agree with the Government's position insofar as it promotes full adherence to two-way cost shifting. This safeguard, however, could be eviscerated by cost-capping, particularly with regard to collective actions.

The Government's position on cost-capping – whereby small claimants would have their costs capped in the interests of justice and at the discretion of the judge[12] – could create the same incentives for abuse as the US system without rigorous definitions for which type of claimant is entitled to such caps. Even carefully crafted definitions of what sorts of entities qualify as "small claimants" may not reduce the potential for abuse. The potential for abuse is exacerbated in the context of collective actions.[13] It is common for a small claimant to bring a claim on behalf of thousands – or millions – of absent class members. Cost capping in such a situation could prevent the cost shifting mechanism from functioning as a proper safeguard. While we acknowledge the Government's cost-capping proposal aims to improve access to justice, the Government should also be on guard against the potential for abuse created by deviations from the loser-pays principle.

The Consultation's proposal that claimants obtain some or all costs from the damage fund created by successful opt-out actions does not appear to alter the claimant's calculus as to whether or not to bring an unmeritorious suit. In light of the large damages that are likely to justify this sort of cost recovery, we believe that it is fair to exempt defendants from separately paying costs in addition to damages, particularly if some of the damages remain unclaimed. However, we note that cost recovery by

[11] *Id.*, §§ A.6, A.9, at p.56.

[12] *Id.*, § A.10, at p.57.

[13] *Id.*

claimant's representatives should be limited to actual costs, and should in no event become a portion of the damages fund; such a percentage-based cost recovery would essentially be a contingency fee, and any regime resembling the contingency fee system is likely to cause a proliferation of abusive litigation.

D. Contingency fees contribute significantly to the persistence of a "litigation culture."

In our experience, the bedrock of the US class-action "industry" is the contingency fee system. Particularly in light of the lack of a loser-pays principle in the US, American plaintiffs and class-action attorneys have the incentive (or at least no disincentive) to bring putative class-actions solely on the basis of those actions' settlement value, without the need to take into account significant countervailing costs imposed for a "failed" action, particularly a failed non-meritorious or weak action. Due to the extraordinary expense defendants must incur to defend a lawsuit, defendants often find it prudent to settle claims, even entirely meritless and ultimately unsupportable ones. By making attorney compensation contingent on the value of a settlement or judgment (or at least on the amount of time spent by the plaintiffs' attorneys prosecuting a case), contingency fee arrangements provide attorneys with incentives to make litigation as expensive and time-consuming as possible for defendants. In our experience, it is almost impossible for a court to prevent the day-to-day litigation abuses of a plaintiffs' attorney who is intent on engaging in such conduct.

Ultimately, the lesson of the US experience with contingency fees is that permitting anyone, whether or not an attorney, to "invest" in a claimant's case – and thereby take a direct (or indirect) pecuniary interest in the way the claim is prosecuted – can be harmful to the administration of civil justice and lead to litigation abuses. We commend the Government for its careful consideration of this potential for abuse, and praise the Government for its steadfast refusal to allow contingency fees. We also respectfully caution the Government that a "conditional fee" system in which attorneys are paid for time spent litigating an action still presents some risk of promoting spurious litigation.

That said, contingency fees are only one portion of the US system contributing to widespread abusive litigation practices, and we note that the

presence of an opt-out collective action system will still threaten to create a "litigation culture" around UK private competition actions.

E. A common tribunal provides significant help in coordinating claims

One benefit of the US system is its multi-district procedure to consolidate and/or coordinate in one court all lawsuits with the same claims for pre-trial matters, including discovery. Particularly after a public announcement of alleged unlawful conduct (antitrust or otherwise), plaintiffs' lawyers in the US typically file dozens of "copycat" complaints in courts throughout the country with one or two "named" plaintiffs each, alleging harm from the same alleged conduct. Under the Multi-District Litigation ("MDL") procedure, all such complaints are subject to consolidation by the Judicial Panel on Multidistrict Litigation ("JPML") into a single US district court for purposes of motions practice (e.g., motions to dismiss and motions for summary judgment), and for consolidated pretrial discovery. The MDL court also typically appoints one or a few "co-lead" plaintiffs' counsel to prosecute the case rather than having a free-for-all with dozens of class plaintiffs' attorneys filing myriad motions and serving uncoordinated discovery requests on defendants.

We commend the Government's proposal to permit collective actions only through the Competition Appeal Tribunal. Directing competition cases to one forum provides significant benefits for plaintiffs and defendants alike. Still, adoption of a single positive element of the US system will not change the underlying incentives to bring abusive litigation present in any opt-out (rather than opt-in) regime.

III. PRESUMPTIONS OF LOSS CAN GROSSLY OVERCOMPENSATE PLAINTIFFS WHO IN FACT SUFFERED LESSER OR EVEN NO LOSS, ENCOURAGE ABUSIVE TACTICS, AND HARM LENIENCY EFFORTS

US courts have long recognized that an antitrust plaintiff is rarely able to prove with any degree of certainty the specific amount of damages

caused by the defendant's established anticompetitive conduct.[14] To address this problem in the US courts, the burden does not shift to the defendant; instead, the plaintiff retains the burden of proving the amount of damages, which is lower than their burden for proving the fact of damage.[15] While plaintiffs retain the burden of proving the quantum of their harm, they may do so using a wide array of methods so long as those methods are not speculative. In making a reasonable estimate of the plaintiff's damages, the trier of fact may "act on probable and inferential as well as direct evidence."[16]

The Consultation notes that the "Government is considering introducing a rebuttable presumption of loss in cartel cases."[17] In our opinion, we respectfully disagree with this proposal. Shifting the burden for proving the quantum of damages, even in the limited cartel context, could create an incentive for abusive litigation practices and could have a chilling effect on leniency applicants suddenly facing the prospect of damages that outstrip actual harms. A rebuttable presumption of loss in many cases could challenge the basic fairness of redress by giving the claimants an unintended "windfall." Because of this potential for damages to exceed actual harms, a presumption of loss may also become the kind of punitive damage that the Consultation expressly states "should not be allowed."[18]

Claimants hoping to win large settlements on unmeritorious or overbroad claims would be aided by the mere presence of a presumption of loss, much the same way US claimants are aided by the mere presence of treble damages. Claimants already hold significant leverage in settlement negotiations, as defendants choosing not to settle must incur all the costs of drawn out legal proceedings—costs that accrue without relation to the

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[14] *See, e.g.*, *J. Truett Payne Co. v. Chrysler Motor Corp.*, 451 U.S. 557, 566 (1981) ("The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation.").

[15] *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

[16] *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 124 (1969) (quoting *Story Parchment*, 282 U.S. at 564).

[17] Consultation, § 4.40, at p.24.

[18] Consultation, § A.8, at p.56.

underlying merits of the claim. Particularly in situations where defendants have little information regarding the amount of the alleged overcharge, the presumption of loss creates a significant additional pressure to settle. If in a given case the presumed level of damages is set at a point that exceeds actual damages, the "rebuttable presumption" becomes a coercive tool that the claimant can wield to extract an unjust settlement. If the UK were to shift the burden of proving the quantum of damages to defendants, the US system for such proof would actually afford relatively more protection against abusive litigation practices than the UK system.

Because the presumption of loss can in effect become a coercive tool for the claimants, its implementation also erodes public enforcement authority. Presumptions of loss skew the economic incentives to report for firms looking to utilize leniency programs. When coupled with the Government's tentative proposals to limit nondisclosure to specific documents involved in a leniency application and to maintain joint and several liability for some applicants, the prospect of facing losses from private follow-on suits exceeding the harms actually caused would further reduce the incentive for cartelists to cooperate with the public enforcement authority.

On account of these concerns, we respectfully suggest that rather than enacting a rebuttable presumption of loss, the Government allow for a variety of methods of proof and subject proof of the amount of damages to a less stringent standard than the fact of damages. In the event that the Consultation's proposal of a rebuttable presumption of loss is nevertheless implemented, the Government should exempt leniency applicants from a presumption of loss to avoid chilling effects on the UK's leniency program, much as the US government exempts the first leniency applicant from treble damages and limits damages to the applicant's own sales, rather than imposing joint and several liability.[19]

[19] *See* Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237 (codified at 15 U.S.C. § 1).

IV. INDIVIDUAL MEASURES TO BOLSTER PRIVATE ACTIONS CAN IN THE AGGREGATE ERODE LENIENCY AND PUBLIC ENFORCEMENT

The US Department of Justice ("DOJ") introduced its Corporate Leniency Policy in 1978, revised that policy substantially in 1993, and introduced its Individual Leniency Policy in 1993. If a corporation or individual is the first to confess to participation in a criminal antitrust conspiracy, they are granted amnesty from criminal charges provided that they comply with the terms of the policies. Between 1995 and 2010, companies were criminally fined over US$5 billion for antitrust violations, and more than US$4.5 billion of these fines were tied to investigations involving the leniency program.[20] The DOJ's leniency program is a cornerstone of the US public enforcement regime.

To further enhance the viability of the leniency regime, Congress passed the Antitrust Criminal Penalty Enhancement and Reform Act of 2004[21] ("ACPERA") and recently extended that Act until 2020. ACPERA limits damages for the first leniency applicant to provide "satisfactory cooperation" to "the actual damages sustained by [the] claimant [that are] attributable to commerce done by the applicant in the goods or services affected by the violation."[22] In effect, ACPERA allows detrebling of damages and relief from joint and several liability in return for the cooperation of the leniency applicant in both public investigations and private damages actions against others.

Similar to ACPERA, the Consultation proposes removal of joint and several liability for the first leniency applicant.[23] We agree with this proposal. We also respectfully submit that the Government should exempt

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[20] Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades, Presented at the 24th Annual National Institute on White Collar Crime (Feb. 25, 2010), *available at* http://www.justice/gov/atr/public/speeches/25515.pdf.

[21] Pub. L. No. 108-237, Title II, 118 Stat. 661 (2004). In 2010, ACPERA was extended until June 23, 2010. Pub. L. No. 111-190, 124 Stat. 1275 (2010).

[22] Pub L. No. 108-237, Title II, § 213(a).

[23] Consultation, § 7.8, at p.53.

leniency applicants from any rebuttable presumption of loss from cartel activity as suggested above. If a leniency applicant faces a risk of paying damages beyond those actually suffered by victims, even after submitting incriminating information in the name of cooperation, there is significantly less incentive for cooperation in the first instance.

The Consultation also proposes a rule preventing disclosure of leniency documents "directly involved in the leniency application and which would not have been created if the company had not been seeking leniency."[24] The Consultation, however, requested views on which documents specifically should be protected. We believe that in order to protect the incentives for whistleblowers to report anticompetitive conduct, all submissions from whistleblowers to the Government should be protected. While claimants should be able to obtain pre-existing company documents in the context of litigation discovery from a defendant company, a whistleblower should feel comfortable that all documents created and documents compiled and submitted to the Government are protected from disclosure by the Government.

From a more theoretical perspective, the Consultation's various proposals to bolster private actions in the aggregate could undermine the ability of the UK public enforcement authority to carry out its leniency program. As is, the primary concerns of firms violating UK competition law are a public investigation, fines levied by the public enforcement authority, and criminal penalties for illegal conduct. The Office of Fair Trading's willingness to reduce cooperators' penal and financial exposure currently provides an enormous incentive for prospective whistleblowers because it removes most of the subsequent risks associated with such cooperation. In contrast, a system allowing stand-alone and follow-on opt-out collective actions would facilitate redress to an extent, but would also distort whistleblower incentives by exposing cooperators to acutely heightened post-cooperation financial liability.

While the Government's nondisclosure proposal and the idea of removing joint and several liability for the first leniency applicant are commendable protections, the potential for exposure to presumed damages in the cartel context, or for exposure based on the sheer numbers

[24] *Id.*, § 7.6, at p.52.

of an opt-out suit, vastly exceed the possible post-cooperation exposure of leniency applicants in the existing UK regime. Increased post-cooperation exposure reduces incentives for cooperation and thus could well translate to reduced effectiveness of the public enforcement authority.

V. CONCLUSION

Among the Government's aims in releasing the Consultation were "ensuring that any changes to the regime do not create a disproportionate risk of exposing businesses to vexatious or spurious claims" and "maintaining the public competition authority at the heart of the enforcement regime." Our experience in the US provides important lessons in these regards. While the Consultation rejects specific aspects of the US class-action system, other elements of the Government's proposals nevertheless could yield US-style abuses. More important than the specific elements of the US system the Government's proposals seek expressly to avoid are the financial incentives the proposed system creates for representative entities that would bring actions, and the ability that the proposed system provides to force settlements disproportionate to the merits of the claim. Moreover, introduction of the proposed system could subvert the highly-regarded public enforcement authority's ability to police anticompetitive conduct. A system that is susceptible to abuse is not good for the government, for businesses or, in the end, even for the persons alleged to be harmed.

We appreciate being given the opportunity to submit comments, and trust that our comments will be helpful to the Government in forming its views on whether, and how, to introduce reforms to the UK's private action regime in competition law.[25] We stand ready to respond to any questions the Government may have regarding our submission, or to further assist in the event the Government would find it helpful.

Antitrust and Competition Group
Skadden, Arps, Slate, Meagher & Flom LLP
July 24, 2012

[25] The views expressed herein are the collective views of Skadden Antitrust and do not necessarily represent the views of any client or clients of the firm.

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Slater and Gordon LLP

Private Actions in Competition Law; a Consultation on Options for Reform

Response to Consultation from Slater & Gordon (UK) LLP

July 2012

Introduction.

Slater & Gordon (UK) LLP is a leading national firm of solicitors with 10 offices across the UK offering a wide range of legal services to individuals, membership organisations and a number of SMEs. It was formed in April 2012 when the UK law firm Russell Jones & Walker joined Australia's Slater & Gordon, the world's first publicly listed law firm. Russell Jones & Walker has had a formidable reputation representing interests of Claimants since its formation in 1926 including acting in many collective litigation cases. Slater & Gordon in Australia has also enjoyed an outstanding reputation as Australia's leading claimant law firm and including being market leaders in collective actions across all Australia's jurisdictions, for claimants including shareholders, businesses and individuals. Together the firms have unparalleled experience in the collective actions filed on behalf of consumers and SMEs.

Summary of our position on this paper.

Slater & Gordon (UK) LLP strongly support the objectives of the consultation paper and in particular option 3 in paragraph 3.21. We believe that the England and Wales jurisdiction should allow private opt out collective actions in competition cases utilising the effective facility of a restructured Competition Appeal Tribunal (CAT) reformed to act as the main court of competence of competition disputes. We would support further extension of collective opt out actions beyond the competition field into other areas where consumers and SMEs have suffered economic disadvantage, in further pursuit of BIS objectives as outlined in the paper.

We answer the questions posed in the paper as follows.

Question 1

Yes. We believe that all competition cases could be handled by the specialist jurisdiction available within the current Competition Appeal Tribunal (CAT). The expertise of that tribunal is unique and we see no reason why it should not normally be the tribunal where such cases are heard. However there may be some more straightforward competition cases which could conceivably be heard within the non specialist courts so it may be advisable to retain that facility also.

Questions 2

Yes. We are of the view that the Act should be amended to allow the CAT to hear stand alone as well as follow on cases. We therefore support an expanded role for the CAT.

Question 3

Yes. We believe it will be desirable for the CAT to be able to grant injunctions.

It is not difficult to envisage situations where adversely affected businesses would be impacted by anti-trust activity in a way such that damages would not be a sufficient remedy and injunctive relief would be appropriate. Some SMEs would simply want the abuse stopped so they could move on in business.

This could also apply where because of the particular circumstances of the case or because of the resource implications it would be counter productive to pursue costly litigation against a large organisation.

The injunctive principles currently applying within the jurisdiction of England and Wales are those that should determine the availability of an injunction in the CAT but with greater restriction (via greater judicial enquiry) on the potential to require cross undertakings in damages. The potential for that to be used by a powerful well resourced abuser to the detriment of the SME (or consumer) pursuing a just claim is conceivable. Whilst it is right that Defendants should not be subject to frivolous claims we believe that the general investigative powers of the CAT are sufficiently strong that vexatious claims would not proceed further than they should.

Questions 4

Yes. We do believe that a fast track route in the CAT would enable not only SMEs but also consumers to tackle anti competitive behaviour. Competition cases can be complex but that is not always the case. They can be complex both in terms of documentation and the legal issues or both and very often will require expert evidence to determine matters relating to damages. But equally there are some cases that would be entirely straightforward. The notion of a fast track and multi track applies in the normal Court jurisdiction and we believe it would work effectively in the CAT. Alternately such straightforward cases could be transferred to other courts on the order of the CAT.

Question 5

In respect of the proposed design elements and costs thresholds and /or damage capping for a fast track procedure we question whether strict limits/ caps are desirable. Competition cases are of many types and a costs cap in the fast track of £25,000 as suggested could cut out too many suitable cases. We think that a higher cap should be set. However as a better solution we see no reason why that issue could not be dealt with as now proposed in relation to the main jurisdictions which is for the court to conduct a "cost budgeting" exercise at the commencement of the case and propose appropriate caps on both sides relative to the issues in that case.

We would also oppose for similar reasons any suggestion that damages be capped as criteria for the fast track case. The determining factor for a fast track case should be the simplicity of the issues in the case and not the amount of damages. The imposing of a damages cap would push into the fast track cases that might be wholly unsuitable for it because of their legal complexity or complexity in providing the type of loss. The allocation or otherwise of cases to a fast track would be a matter for the judiciary within the CAT but there should always be an escape potential in appropriate cases.

In making this point we are looking at the issue from the consumer perspective as well as the SME's perspective. Both an equally important. Both groups are suffering the same level of injustice from the restrictions that apply in the current civil redress regimes.

Question 6

As to what else can be done to assist SMEs bring cases to court again we answer this in the context of not only the position of SMEs but also consumers bringing competition cases.

In part this question also triggers the need for court rules to define what an SME is for this purpose. At one end there is the sole trader akin to the consumer. But a sole trader might also be a single owner of a larger business and when does a business cease to be an SME? Is a well resourced/ fully insured SME to be a beneficiary of a fast track service? In practice should not the fast track facility simply be available to all claimants with non complex cases?

It would in our view be beneficial to define a CAT fast track case as including any case with a value from nothing to whatever figure should be determined to be a fast track limit if any. The degree of complexity is the issue. The small claims procedure operated in the normal County Court is wholly ineffective for considering any case of even moderate complexity or length and that would apply to most competition cases even the lowest value ones. This is the more

so if the small claims court jurisdiction level rises to £10,000 then to £15,000 as proposed. We suggest that there should not be a small claims jurisdiction for small competition claims. Many consumer claims (the football shirts claim would be an example) would have an individual value well below the level of small claims jurisdiction but potential complexity and collective value substantially above the type of cases that would warrant the small claims track approach. But neither should it be the number of persons in a collective competition claim that determines which track it falls within.

So we believe all collective consumer and SME cases should be within the jurisdiction of the CAT and that they should be either Fast Track or Complex and costs should generally follow the event in the normal way irrespective of the actual value of the claim unless in the view of the Court the claims were for trivial amounts (but see also below in 17). We bear in mind also the problems in determining the actual value of competition law claims at the point when they are first proceeded with, particularly as the number of Claimants may expand during the progress of the case once the existence of the litigation becomes known.

So in our view the definition of what falls in the fast track would be by complexity rather than the volume or value or cost. A straight forward claim with many parties could be suitable for the fast track in our assessment. Therefore we see the procedure in the fast track as being one of processing through the stages of disclosure, exchange of witness evidence, obtaining expert evidence when necessary and listing for trial. Complex cases would be those that are likely to demand a wider array of interlocutory assistance and judicial intervention pre trial.

Question 7

The concept of a rebuttable presumption of loss as a fixed percentage of the transaction costs cost in competition abuse cases is an interesting one. The determination of an appropriate figure is more difficult. In some market abuse cases it might be relatively easy to determine what the value of loss will be. This might be the case where a price was exaggerated for the sake of securing disproportionate profit. But in many other cases the figure may be more difficult to determine and a potential for loss to be predetermined could give rise to injustice either way. However we believe that in some consumer claims this idea might be of assistance. In SME cases we anticipate greater resistance. The complexity of determining the damages where there have been a number of parties passing on the consequences of a price fixing arrangement would be a good illustration of this point. The impact at different levels of the passing on process could well vary and so a fixed figure approach to the presumption of loss might over compensate one party in the chain to the disadvantage of another.

The 20% of transaction value figure proposed is allegedly based on economic analysis without the source of that being disclosed. We have a concern that the number of rebuttal claims over a fixed figure, be it 20% or otherwise might be as great as the number of cases actually brought. Whichever party sees the say 20% as to its advantage would be content but that which sees it as a disadvantage would take the issue. In short it may achieve little. In lower damage consumer cases it may be a sensible way forward to reduce costs. However in all cases it should be rebuttable. Certainly there could be penalties attached to a party that unreasonably challenges the rebuttable figure. So if it were 20%, a challenge which secured a reduction of less than 5% or an increase of less than 5% might ordinarily be penalised in costs?

Question 8

We do not believe there is a case let alone a strong case for the "passing on" defence to be dealt with in the post consultation proposals that emerge. It is a matter which arises in some cases but not in many. We think that to deal with it may add a layer of complexity that is unnecessary.

Question 9

Our view is that the current collective action regime is not working in competition case (and for that matter neither is it working in many other spheres of collective redress) and therefore we strongly support the notion that a more effective collective remedy be available.

As the paper highlights consumers and business have a fundamental right to seek redress for themselves when their rights have been abused but SMEs and consumers both feel substantially disadvantaged under the present regime such that their rights go unenforced.

Question 10

With regard to the Jackson reforms which have now been largely confirmed into legislation and will be brought into effect in April 2013 we believe that the BIS proposals and their policy objective of effective collective actions and a more balanced system of redress are consistent with the access to justice objective behind those reforms.

It is widely believed that from the perspective of small businesses and consumers, the implementation of the Jackson reform however well intended, may in fact make it more difficult for them to pursue justice. It is now widely recognised that some of the balances that Lord Justice Jackson sought to introduce into his reforms are not capable of being carried into law. Strengthening the rights of consumers and SMEs through opt out collective action is something he might well have embodied as an alternate positive balance had he known that some of his other proposed balances could not be achieved.

We reaffirm our support for the BIS department's policy objectives as set out in the paper and believe that the proposal will secure better access to justice to the benefit of both businesses and the consumers. It is no good for a country's economy to be vulnerable to unrestricted anti competitive practices and market abuse. There is substantial reputational damage potential and this kind of activity must be stopped.

This is particularly so at a time when the statutory enforcement procedures are subject to limitation through the need to redistribute and cut back on public resources.

Question 11

We do believe strongly that the right to bring collective action for breaches of competition law should be granted equally to businesses and consumers. They have suffered in similar ways as a result of identical activity and there is no basis for a distinction.

Question 12

We do not see any need for additional restrictions to be introduced to prevent collective redress claims being used as a vehicle to secure information to the benefit of competitors. The existing powers of the Court in all jurisdictions prevent litigation being abused for such purposes and we would see no difference with what is proposed now by BIS.

Question 13

We believe that collective actions should be allowed in stand alone cases where there is no related regulator action but they should also be used in follow on cases. We would therefore anticipate both stand alone and follow on collective actions as being permissible. In cases where a stand alone case was brought whilst a regulatory body was continuing to investigate a matter we would anticipate the stand alone case could be stayed although a stay in our view should not be automatic but subject to a decision of the Court on application.

Question 14

Our view is that opt out collective actions are preferable to opt in or other forms of collective action.

There has been a significant debate about this issue over some years and we share the position of the department that the public enforcement regime needs to be supported and complimented by private sector resources. We cannot continue to delay on this. The UK is increasingly losing out to other EU and non EU jurisdictions who have already introduced effective collective regimes. Businesses and consumers in the UK need to be able to take direct actions against anti competitive behaviour that is preventing their own growth as well as discrediting their business community. The paucity in the number of competition cases that have been brought as shown in paragraph 3.12 is evidence itself that the present system is not working. Group Litigation Orders (GLOs) are to all intents opt in and are what currently applies and what has failed to delivery justice for consumers and SMEs. As you highlight in 3.14 the potential for representative actions to be effective is also limited. Test actions, as they are known, are ineffective because of the capacity of the abusing party simply to buy off the test cases and frustrate the test objective. We need something new and something that works. Opt in is the status quo that has failed

What is needed is real collective redress. The mechanism for opting in is clumsy and carries with it significant cost implications which are counter productive to the objective. At the least, a liability opt out and a damages opt in might work better than what we currently have

However we accept that with opt out there has to be an acceptable system of certifying the class of persons to be covered by the opt out arrangement.

We see that role being performed by the CAT in the event that a proposed class is challenged by a party with a legitimate interest. The CAT would then act as a form of gate keeper deciding whether cases can continue as an opt out. The CAT would have the power to hear a potential Defendant's views on whether an opt out class would be inadvisable. The burden would be on the Defendant to persuade the Court that an opt in procedure was appropriate.

We believe that the CAT could establish guidelines as to what was suitable for opt in and opt out. However opt out should be the presumption to be rebutted on sound evidence of unfairness.

Question 15

The list of issues to be addressed at certification as set out in Annex A of the consultation is satisfactory in our view although we would expect these to be developed and added to or varied over time.

A number of commentators will undoubtedly raise with you the meaning of "sufficient funds". In a post Jackson environment many collective claims will be funded through a Damages Based Agreement (DBA) or some other result contingent scheme with or without insurance or possibly with third party funding. We suggest word 'funds' should not be interpreted in a narrow way and "resources" may be preferable.

Question 16

We don't support the addition of penative damages although we believe that exemplary damages for gross misbehaviour/ where the objective was to secure excess profit should be awardable as at present

Question 17

The question of whether the loser pays rule be maintained for collective action may seem a complex one.

The general principle ought to be that costs follow the event. However in personal injury claims that is about to be changed with the introduction of qualified one way costs shifting from next April when costs will not follow the event if a claimant fails. The position of such PI claimants is analogous to competition abused consumers.

Whilst we would not ask for cost shifting to be applied in consumer collective cases at this stage, we do believe that in relation to liability matters in collective actions where opt out is applicable there is a need for the determination of costs liability to be looked at de novo where the claimants fail. In all such cases there ought to be a n enquiry at the relevant point as to whether or not costs should follow the event or whether no order for costs should be made, or possibly in exceptional circumstances that the Defendant should nonetheless bear the costs. The inquiry would include whether the whole of the class could reasonably be identified and expected to be able to meet the costs given their profile. It would also consider whether non accessibility of documents at an earlier stage had materially affected the claimant's prospects such that costs should not be awarded to a defendant and whether there were insurers/funders of the class.

That as we say would apply at the liability stage. At the quantum stage costs could follow the normal rules in particular if a Part 36 offers had been made that was above damages recovered.

Question 18

In relation to whether the user pays rule should be departed from in collective redress cases in the interests of access to justice/ by payments instead from the damages fund we believe that in appropriate cases this may well be the case under existing rules so there may be no need to deal with this point ?

Question 19

We would not agree that contingency fees be prohibited in collective action cases. The question in some ways is otiose as DBAs are now to be allowed in civil litigation. They are currently available in the Employment Tribunal in what is considered to be non contentious litigation but from April 2013 they will be permitted in the whole of the civil jurisdiction. Contingency fees therefore should be available in collective action cases and indeed that may become the norm in consumer cases collective and otherwise. It is currently envisage caps will apply to the contingent element and that normal costs recovery will continue and apply towards meeting the client's contingent liability so it will not be US style contingent fees.

Question 20

The issue of what happens to unclaimed sums following on from collective action is an interesting one and given our association with the Australian experience where Cy-Pres does not apply we have been able to look at this matter from a wider perspective than some lawyers in our jurisdiction might have been able to.

Non applied funds should not go back to the Defendant. We consider that there are three realistic options for non applied damages. Unclaimed sums should either be re-divided amongst the successful Claimants who have been identified or go to an appropriate body or be split between the two On balance we would favour some split. We see the advantage, particularly with access to justice challenged in some aspects of our jurisdiction, of the idea of a body which has as its objective securing access to justice being the recipient of part of the funds arising from unclaimed damages. But we would prefer the hybrid situation where the unclaimed funds are redistributed at least in part to the successful Claimants.

We bear in mind that very often even when they win claimants are not fully compensated by the damages system and that there is often for the sake of achieving global agreement some give and take. Partial distribution under Cy-Pres to an appropriate body and partial distribution to the Claimants themselves would go some way towards redressing that reality.

Question 21

If the sums unclaimed or part of them as we suggest, were to be referred in part to a specified body we would in principle support distribution to the Access to Justice Foundation. However there may in time be more than one such organisation in existence and indeed we would anticipate that so that "the Access to Justice Foundation or some similar purposed body" for the part not reassigned to claimants would be preferable.

Question 22

We agree that the ability to bring opt our collective action for breaches of competition law should be granted to private bodies as well as the competition authorities. We would be surprised if either would be able to handle all matters and neither one nor the other should be excluded.

We do not believe that a competition authority should be a natural first choice but the option should be available for either private bodies or the competition authority to take the matter forward. There may well be instances when it would be preferable for the competition authority to be involved earlier or not and that is something that the CAT could consider in any given case on an application for a matter to be stayed /pending consideration of whether the other body should take the matter forward. The functions should be complimentary.

Question 23

We hope that the ability to bring collective action will be granted to private bodies and we certainly don't agree that the private bodies should be just those who themselves have suffered harm or be genuinely representative bodies of that type but should be extended also to any regulated legal firm .

We would not support that being further extended to third party funders. Third party funders although providing a useful service are effectively betting on cases and the potential for conflict of interest is significant. Law firms and third party funders working together removes that risk. Solicitors firms are subject to the rules of the Court, solicitors are officers of the court, and firms are under the scrutiny of the judiciary during the procedural stages which funders are not.

Question 24

We agree that ADR in competition private actions should be encouraged but that it should not be made mandatory.

The issue of whether ADR is a mandatory or not is one that has been discussed in all areas across our jurisdiction and after debate has not been supported. We support the use of ADR in the wider sense rather than the restrictive formal mediation sense. It should be encouraged but in our experience mandatory ADR presents as many problems as it seeks to solve. Not least when a Defendant is able to use that and its own unwillingness to be in litigation as a method of blocking and slowing down the process of investigation. Mandatory ADR can delay a case to the point where injustice arises when eventually the claim has to be taken forward through litigation.

Question 25

We do support the idea of a pre action protocol in collective actions before the CAT including the fast track there. Pre action protocols have benefited the civil justice system since their introductions post the Wolf reforms.

Whilst some would suggest that the effectiveness in pre action protocols in competition law is less clear and there is a risk that the procedure could be used to trigger attempts to seek jurisdiction in another country (and with a slower legal process) we believe that these

concerns can be got round by classifying the pre action protocol as a proceedings stage under the CAT rules.

We do not think it will be sufficient in cases not involving cross border issues, if the pre action protocol initially were encouraged rather than mandatory. Potential penalties attaching to parties who fail to respond the procedures where it is clear that they would have been beneficial should be in place.

Question 26

The rules governing formal settlement offers should be consistent throughout all jurisdictions in England and Wales. So the CAT rules should embrace Part 36 offers in the same way as the other courts do. Part 36 offers should be available to both sides on both liability and quantum but this may require some adjustment to other parts of the CAT rules regarding formal settlement offers. When a Part 36 offers is considered the CAT should also look at what information was available to the parties at the time it was made and whether that knowledge was in some way limited by a failure by another party to give timelier disclosure or information to the other. For example a Part 36 offer made by a defendant before disclosure by a Defendant and at a time when that Defendant had not given adequate information to the Claimant ought to be subject to review and not applied strictly. In competition cases where one party has all the information about abuse and the other is likely to have nothing it would seem fairer to apply that approach. Otherwise justice may be abused as well as the market.

Question 27

As an individual law firm we are not in a position to influence initiatives except with the consent of Defendants. However we have a reputation for being innovative and have in the past established schemes with defendants and other organisations to work towards the resolution of multiple disputes avoiding litigation and we would certainly wish to continue in that manner. We have always seen litigation as a last resort.

Question 28

We see collective settlement in the field of competition law as part of opt out collective actions. We are aware of systems operated within the Dutch jurisdiction which have a multijurisdictional impact and we would not criticise the value of such arrangements if that is what the question addresses. The principles of damage recovery should be dependant on the individual jurisdictions. So that whilst a liability jurisdiction could have a collective effect across the jurisdictions the amount of damages ought to be assessed on the basis of how losses are calculated in the jurisdiction of the party suffering loss but with a view to harmony.

Question 29

We see no reason why the competition authorities should not have the power to order a company found guilty of an infringement to implement a redress scheme.

However that should not prevent litigation to supplement a scheme. There have been recent occasions where regulatory bodies have set up redress schemes when neither the consumers/ businesses adversely affected nor the corporate defendants have been happy with the scheme and have wished to pursue alternative remedies instead/as well. A redress scheme should therefore be complimentary to the litigation /adr option, though damages would not be recoverable twice.

Question 30

Yes, the extend to which a company has made redress could be taken into account by competition authorities when determining what level of fine to impose but it would be a matter for the competition authority to decide to what extent that would influence their decision.

Question 31

We do believe that an extended role for private actions will positively compliment current public enforcement. Current enforcement has been useful but the resource pressures are enormous and it cannot cover every environment. There is a current shortfall in the redress mechanisms. We do believe that public enforcement should remain an important and critical part of the regime alongside private enforcement

Question 32

We understand this issue is being considered within the EU and do not have further comment.

Question 33

Again the protection of whistleblowers has wider implications than just within the context of the current proposals for collective redress and we have no further comment to make.

Question 34

For similar reasons to the above, no comment.

Summary

We have very much appreciated this opportunity to comment on this important paper.

We believe that the objective of the Government in assisting the securing of our nations reputation and economic future through the discouragement of market abuse, will be greatly enhanced by the adoption of the option 3 proposal put forward by the Department in this consultation paper and we hope that it will secure Option 3.

Legal services make an important contribution to the UK economy. The UK's reputation as the legal jurisdiction of choice for the global world has recently fallen behind a number of other European nations in the field of collective redress because those nations have developed effective collective redress mechanisms and those nations, particularly Holland, have benefitted from our lack of focus on this issue. Introducing opt our collective redress in competition cases would reassert our standing and benefit our businesses and our citizens as well as encouraging better practice amongst our leading businesses where market abuse regrettably occurs.

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Tony Monblat
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Dear Mr Monblat,

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

We refer to the consultation paper on private actions in competition law published by the Department for Business Innovation & Skills on 24 April 2012 (the '**Consultation Paper**'). This letter sets out the views of the Slaughter and May Competition Litigation Group on the Consultation Paper.

Overview

We welcome the opportunity to comment on the Consultation Paper, and we support the Government's overarching objective in seeking to make the UK private actions regime more effective.

We set out in Sections 1 – 34 below our views on specific questions raised in the Consultation Paper.

In particular:

(i) **We strongly support the Government's proposal to expand the role of the Competition Appeal Tribunal (the "CAT") and establish it as the principal forum for competition actions in the UK.** We also support the proposal to enable the CAT to grant injunctive relief. We do not believe that the introduction of a formal fast track procedure is appropriate for competition cases and suggest instead that greater discretion be given to the CAT to accelerate suitable cases. (See further sections 1 to 6 below)

(ii) **We do not support the introduction of a rebuttable presumption of loss in cartel cases** – we do not believe there are grounds to depart from the principle that a party claiming loss must prove that it is entitled to redress (particularly given that competition law infringements do not always result in loss to

purchasers), nor do we consider that there is sufficient evidence to support the proposed 20% figure, which is both arbitrary and high. We agree that there is no need to legislate on the passing-on defence at this time. (See further sections 7 to 8 below)

(iii) **We support a measured and proportionate extension of the existing collective actions regime** - we do not support the introduction of an opt-out collective regime but instead support an enhanced pre-trial opt-in system for collective actions, whereby claimants may opt-in until a late stage in the proceedings. This will address the current deficiencies while avoiding frivolous or vexatious claims. (See further sections 10 to 14 below)

(iv) **We support the preservation of the loser pays principle in collective actions** – we do not believe there are grounds to remove this important safeguard against unmeritorious and/or opportunistic claims nor do we support the imposition of cost caps. We also agree that there are no grounds to introduce punitive or treble damages and we support the continued prohibition of contingency fees in collective actions. (See further sections 15 to 21 below)

(v) **We support allowing private bodes to bring collective actions** – this will preserve the OFT/CMA's resources for its primary objective of public enforcement while broadening access to redress. We do not support allowing legal firms and/or third party funders to bring collective actions as representative claimants – this risks creating a "litigation culture". (See further sections 22 to 23 below)

(vi) **We support the introduction of a mechanism for collective settlement (but on an opt-in basis only)** – this would encourage the use of alternative dispute resolution. We do not support giving the OFT/CMA the power to unilaterally impose schemes for redress on parties but support allowing the OFT/CMA greater flexibility to resolve cases with parties and to include elements of redress in such settlements. Private redress should only be taken into account in appropriate circumstances in the calculation of fines imposed under the public enforcement regime. (See further sections 24 to 30 below)

(vii) **We agree that private actions may produce outcomes that will positively complement the current public enforcement regime; however there is a need to address the risk that this may decrease the attractiveness of the OFT's leniency regime** – we therefore support the protection of certain leniency documents from disclosure but do not support any change to joint and several liability at this time. (See further sections 31 to 34 below)

The Role of the CAT

1. Transferring cases from the High Court

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

1.1 As a general point, we fully support the Government's proposal to broaden the scope of competition cases that may be heard by the CAT to maximise its potential as a specialist court within the UK competition regime. The CAT's respected track record of handling complex competition litigation demonstrates that it has the necessary cross-disciplinary expertise and experience to rule on difficult questions of competition law and to manage cases efficiently. We therefore agree with the Government that the CAT is the most appropriate forum for hearing competition private actions in the UK and support the proposal that Section 16 of the Enterprise Act be amended to enable the courts to transfer competition law cases to the CAT.

1.2 However, we note that expanding the scope of cases which may be heard before the CAT risks causing confusion as to the appropriate limitation period to be applied, particularly as regards cases that are part stand-alone and part follow-on.[1] Careful consideration should therefore be given to the application of limitation periods to competition law cases in each of the High Court and CAT, particularly in view of the need to preserve a separate limitation period for follow-on actions given the lengthy nature of the public enforcement and subsequent appeals process.

1.3 We do not propose that any change should be made to the current limitation periods applicable to stand-alone actions (which we consider should continue to follow the High Court approach under the Limitation Act 1980, i.e. six years from the date the cause of action accrued, even if the CAT is enabled to hear stand-alone actions) or follow-on actions but suggest that clear guidance be issued on the application of limitation periods.

1.4 Irrespective of the position on limitation periods, we also note that the current prohibition under Section 31(1)-(3) will likely become redundant if the courts are enabled to transfer cases to the CAT. This prohibition prevents claimants from starting proceedings before a final decision has been made at the end of a review process except with the permission of the CAT. As no such limitation applies in the High Court, it will be possible to commence a case in the High Court whilst an appeal process is ongoing and seek transfer to the

[1] We note that the position on when the CAT's two year limitation period starts to run is in any case currently unclear but it is expected that the Court of Appeal's judgment in *Deutsche Bahn* (due imminently) will clarify the position (see our response to Question 12 for further detail).

CAT. Notwithstanding the fact that the CAT may stay any proceedings seeking to utilise this loophole, we suggest that this prohibition is removed.

2. Hearing cases directly

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

2.2 As explained in our response to Question 1 above, we agree with the Government that the CAT's expertise and experience in managing and adjudicating complex competition litigation makes it well-placed to be the principal forum for private competition actions in the UK. Allowing the CAT to hear stand-alone cases represents a positive step towards better utilisation of the CAT's potential and will provide claimants in stand-alone actions access to a court with specialist knowledge and experience.

2.3 It is also clearly to the benefit of the private enforcement regime that claimants may be spared the need to demonstrate whether the CAT has jurisdiction to hear a claim in cases where there is any question about whether an infringement decision covers the loss or damage being claimed – a process which can be expensive and prolonged (as demonstrated by *English Welsh & Scottish Railway Limited v Enron Coal Services Limited* [2009] EWCA Civ 647).

2.4 However, we again note that the expansion of the CAT's role will necessitate clear guidance on the application of limitation periods to cases involving breaches of competition law.

3. Injunctions

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

3.1 We support the CAT being enabled to grant injunctions where it is just and convenient to do so, consistent with the power of the High Court to grant injunctions under Section 37 of the Senior Courts Act 1981.

3.2 We note that Parliament has previously objected to a proposal enabling the CAT to grant injunctive relief because it considered such a power to be unnecessary where the CAT dealt only with follow-on actions, as injunctive relief could be more appropriately granted

by the OFT in the form of directions at an earlier stage.[2] However, to the extent that the CAT will, going forward, be enabled to hear stand-alone cases, this objection is no longer applicable. It is clearly desirable that the CAT be empowered to grant injunctive relief in stand-alone cases, for example, so as to order an infringement to be brought to an end.

3.3 For the avoidance of doubt, we support the CAT being granted the power to deliver injunctive relief in all cases, whether follow-on or stand-alone, although, as noted above, we envisage that this power will be most relevant to stand-alone cases.

3.4 As a point of order, the Government may wish to consider amending Section 49 of the Competition Act 1998 (which sets out the grounds for appeal for decisions of the CAT to the Court of Appeal) to expressly provide that injunctive relief granted by the CAT may be appealed to the Court of Appeal.

4. Fast track route for SMEs

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

4.1 We are not convinced that the introduction of a fast track route for SMEs is appropriate for competition cases in light of the often complex nature of competition law claims. Instead, we support the proposal that greater discretion be given to the CAT to accelerate suitable cases (not just those involving SMEs) through the use of expedited case timetables (e.g. where possible, without prejudicing the parties' rights, aiming to resolve these within six months), restricted disclosure processes and creative approaches to expert evidence and the like. We see no reason for exclusively limiting such accelerated case management orders to SMEs and can envisage attempts to define SMEs resulting in extensive satellite litigation as to who is an 'SME'.

4.2 In our view, the majority of competition law cases (particularly stand-alone claims) are unlikely to be suitable for the proposed fast track method as they cannot realistically be brought to trial within the proposed six month timeframe or be properly heard within a four day hearing without prejudicing the proper administration of justice and either party's right to a fair trial. This difficulty will apply even if the fast track process is limited to low value claims as the complexity of a competition law case is not generally determined by the value of the claims. The Government's own suggested examples of abuse of dominance cases in Box 2 are clearly illustrative of this issue as building a case alleging abuse of

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[2] See debate of the Standing Committee on Bills (Colum number 114 – 115), available at: http://www.publications.parliament.uk/pa/cm200102/cmstand/b/st020418/pm/20418s03.htm.

dominance claim will involve difficult questions of law and fact and has, in past instances, often taken a number of years.

4.3 We also note that the Government indicates that it expects most cases heard using the fast track to be settled following the application of interim relief (in particular, injunctions). The purpose of interim relief is, by definition, to provide a temporary measure until a case has been examined fully on its merits. Notwithstanding the difference in approach taken by the CAT towards granting interim relief[3], which involves a slightly more in-depth review of the merits of the case being put forward (but, in light of *Sky v Ofcom*[4], appears likely to change as the CAT may move towards the modified *American Cyanamid* approach taken by the High Court), it is contrary to the interests of justice for interim relief to be granted in circumstances where it is envisaged that the relief granted should provide the basis for permanent settlement of claims (i.e. the relief will not be reviewed upon a proper examination of the merits of the case).

4.4 In addition, we consider that such an approach could lead to an increase in vexatious and unmeritorious claims, which defendants are incentivised to settle, thus leading to the unjust enrichment of claimants.

4.5 In our view, the objective of encouraging SMEs to pursue private actions by providing a process that is cheaper, quicker and simpler would therefore be better achieved by increasing the CAT's discretion as regards case management and outcomes. This represents a more measured and proportionate approach that carries far less risk of prejudicing a defendant's right to a fair trial.

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[3] Unlike the High Court, which applies a modified American Cyanamid test (as set out in *American Cyanamid Co v Ethicom Ltd* [1975] AC 396), the CAT currently requires a party seeking interim relief to demonstrate that they will suffer serious and irreparable harm (not mere financial loss) if relief is not granted (see *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading (interim relief)* [2001] CAT 1 and *Genzyme Ltd v OFT* [2003] CAT 8). An important reason for this has been that competition appeal cases heard by the CAT are not "party and party litigation" (this is relevant to the assessment of interim relief in follow-on actions as the OFT, in the enforcement of its public duties, is not obliged to offer cross-undertakings in damages against the risk that an interim decision is found to be wrong at final judgment) – this will clearly no longer be the case if the CAT is empowered to hear stand-alone actions.

[4] *British Sky Broadcasting Limited v Office of Communications* [2010] CAT 29.

5. Proposed fast track model

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

5.1 For the reasons outlined in our response to Question 4 above, we do not support the proposal to introduce a fast track regime for SMEs. Notwithstanding this view, we would like to make some limited comments on the proposed design elements of such a fast track process in case the Government decides to pursue this option.

(i) Caps on costs and/or damages: in light of the complexity and often high costs associated with bringing or defending competition cases, we consider that it is important that the loser-pays principle is preserved in competition law cases, including under the proposed fast track model. The availability of "before the event" or "after the event" ("**ATE**") insurance to cover the costs of legal proceedings (albeit at the cost of the insurance premium when section 29 of the Access to Justice Act 1999 is repealed next year) should address concerns that funding issues may be a disincentive to pursuing private actions (see our response to Question 18 for further discussion).

We are also not in favour of any cap on damages as, in our view, claimants should be able to recover full compensation for any actual loss suffered as a result of an infringement of competition law.

(ii) Emphasis on injunctive relief: we agree in part with the Government's view that, in certain cases, the ability to challenge anti-competitive behaviour may be a higher priority for businesses than obtaining redress in the form of damages. This is illustrated by Example 1 of Box 2, which describes a SME that is threatened with the termination of its supplies of a product by a manufacturer. However, as explained in our response to Question 4 above, we would caution against an approach that envisages that orders for interim relief will provide a permanent solution or the basis for settlement.

(iii) Letter preceding fast track process: for the reasons noted by the Government in paragraph 4.35 of its consultation, we strongly oppose the proposal that letters preceding the fast track procedure should be written by either the OFT or the CAT.

6. Alternative options

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

6.1 Please see our response to Questions 10 to 22, in particular Question 11, for our views on expanding the collective actions regime to enable SMEs to bring competition cases to court.

7. A rebuttable presumption of loss in cartel cases

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

7.1 We are strongly opposed to the proposal that a rebuttable presumption of loss be introduced for cartel cases, both as a general principle and as regards the arbitrary 20% figure proposed for the reasons set out below.

7.2 The proposal to introduce a rebuttable presumption of loss represents a radical move from the important legal principles in the UK that:

(i) the burden of proof for damages claims rests with the party claiming loss; and

(ii) given that the purpose of civil damages is to provide compensation to claimants for actual loss suffered, loss is a question of substantive law to be decided by courts on a case-by-case basis.

7.3 We do not agree with the Government's analysis that the current position merely reflects a rebuttable presumption that no loss has occurred (in favour of the defendant), which should be switched to place the burden of proof on a defendant in light of the defendant's likely informational advantage. It is a fundamental principle in both tort law and contract law that a person claiming damages from another party must demonstrate their entitlement to those damages – this principle is a crucial safeguard within the law to avoid unjust enrichment and to deter spurious claims.

7.4 The importance of this safeguard, to protect the rights of defendants, applies in competition law as much as in other areas of civil law. It is not the case that every infringement of competition law results in any loss to purchasers. In particular, we note that in cases where the OFT investigates an objects based case, there is no requirement on the OFT to find an effect on the market in order for there to be an infringement of competition law. The application of a rebuttable presumption of loss in objects based cases would therefore seem particularly problematic.

7.5 Not only would the introduction of a rebuttable presumption of loss encourage the bringing of spurious and vexatious claims, it would also encourage defendants to settle such claims where the expected time cost and financial expense of defending the claim is likely to exceed the arbitrary threshold of presumed loss. This will inevitably result in unjust outcomes for defendants.

7.6 Moreover, whilst we acknowledge that establishing quantum of loss is frequently a complex process in competition law cases, we do not consider that there is sufficient evidence to demonstrate that the cost of proving damages in particular is a primary disincentive for parties to commence litigation. To the extent that other aspects of the current private actions regime may provide a greater disincentive to commencing litigation, we suggest that the environment for private actions could be improved more effectively by instead addressing these other issues.

7.7 In our view, the proposed change therefore is not adequately justified by the objective of encouraging private actions when this objective may be met through other more measured and proportionate means.

8. The passing-on defence

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?

8.1 We agree with the Government that there is not a strong case for directly addressing the passing on defence in legislation. In our view, the passing-on defence is best dealt with on a case-by-case basis by the courts and, rather than being viewed as a defence, is best simply considered as an issue of quantification of loss, in common with other tort claims. Moreover, any legislated measures addressing passing on would have to be addressed at an EU level to be effective; legislative amendments in the UK would simply see the majority of affected would-be claimants bring their claims in other EU member states.

8.2 The possible negative consequences of introducing a rebuttable presumption that a loss was passed on it its entirely include unjust over-compensation of indirect purchasers and increased difficulty for direct purchasers to bring claims (which would likely lead to an overall decrease in the number of actions brought as direct purchasers will usually be better placed to bring a claim).

8.3 The alternative of expressly prohibiting the passing on defence would, as the Government notes, deny indirect purchasers to justice, contrary to EU law.

8.4 We therefore consider that the current position under which the burden of proof rests with the party alleging passing-on (typically the defendant and/or the indirect purchaser) remains the best approach.

Collective Actions

9. Extending the regime

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.

9.1 In assessing the effectiveness of the current collective regime, there is the temptation to draw a link between the fact that only one collective action has been brought in almost ten years (*JJB*[5]) and that case's limited success. In our view, the reasons for the low incidence of collective actions and the limited success of that case need to be carefully considered.

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

9.3 In addition, a number of infringement decisions reached by the OFT/European Commission do not readily lend themselves to collective redress claims; in many cases the infringing conduct will have taken place in an upstream market, making it difficult to assess what proportion of overcharge (assuming the competition infringement leads to an overcharge) was ultimately passed down to consumers.[6]

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

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

[6] For example, the three highest fined cartels sanctioned by the European Commission include cartels in Car Glass, Gas Insulated Switchgear and Elevators and Escalators.

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

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

9.7 Finally, we accept that a pre-action opt-in regime faces challenges in attracting high levels of participation in collective actions, noting the evidence put forward by the Government at §5.19 of the Consultation. We do not though consider that this in itself automatically justifies a shift to an opt-out model for collective actions (see details of our position in our response to Q14). Rather, a measured and proportionate extension of the opt-in collective actions regime, together with a small but defined role for the OFT/CMA (see response to Q29), is likely to result in greater access to redress for consumers and/or small businesses that suffer loss arising out of breaches of competition law.

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.

10.1 From a pure policy perspective, we are not persuaded that there is justification for the inclusion of deterrence as an express policy objective connected with the reform of collective actions in competition law. Deterrence, as a policy objective, is a function of public law enforcement. Competition law is vigorously imposed in the UK and EU with

heavy fines imposed; such fines being levied at a level that is designed to deter others from infringing competition laws.

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

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

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

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

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

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

11.3 We do, however, recognise that in some cases the barriers that hinder consumers from seeking redress will also apply to SMEs. In contrast with large, well resourced companies, for SMEs the costs of bringing legal proceedings in the CAT or High Court are likely to be prohibitive (particularly when the risk of costs exposure is taken into account). Additionally, even if an SME is able to bear the costs of litigation - noting that the corollary of the loser pays principle is that it will recover costs if successful - it may be that, much like with consumers, its quantum of loss does not justify the expense of bringing legal proceedings to recover its losses. This point is illustrated by the Government's example of cartelised printer cartridges (Box 3 of the Consultation paper).

11.4 In order to make redress available in these circumstances, we are, in principle, supportive of the collective actions regime being extended to include SMEs. Although we consider that the regime should not, in practice, be open to large companies we do not propose that the regime is strictly extended only to a defined class of SME claimants. We can envisage attempts to define a class of SMEs, to whom the collective action regime would be available, resulting in extensive satellite litigation concerning claimants' status as SMEs (and in this respect see also our response to Question 4).

11.5 In light of this concern, it would seem necessary to extend the collective action regime to businesses generally but to provide clear guidance for the CAT to apply at the certification stage to ensure, on the one hand, that the regime is made available to appropriate SMEs, but on the other hand, is not extended, except in appropriate cases, to large/well resourced companies for whom collective action is not necessary and/or appropriate. In particular, we are concerned to ensure that the regime is not unnecessarily extended to large/well-resourced businesses that, acting collectively, would be able to bring serious pressure to settle, above and beyond the ordinary pressures of a strong case. Extending the regime in this way will require the CAT to be provided with detailed guidance as to

which businesses the collective action ought to be potentially available to (see response to Question 15).[7]

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

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

12.1 We do not envisage anti-competitive information sharing to be a material concern in allowing collective actions to be brought by businesses (namely SMEs).

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

(i) First, the issue already exists in the context of certain types of competition cases that come before the CAT, namely appeals by multiple parties of decisions of sectoral regulators such as Ofcom and also in connection with merger inquiries and appeals. It is common practice for these sorts of cases to involve extensive use of complex confidentiality/counsel-only arrangements to avoid the risk of any inappropriate information sharing.

(ii) Practitioners are therefore familiar with the use of such arrangements (as is the CAT) and are well placed to advise their clients on ensuring such safeguards are in place. Similarly, practitioners are well aware of the implications of the sharing of price/future strategy related information between competitors in terms of Chapter I of the Competition Act/Article 101 of the TFEU and thus well placed to ensure their client's conduct in collective actions is competition law compliant.

(iii) Finally, we note that, under its current rules of procedure, the CAT has extensive case management powers, more than sufficient to enable it to make orders to obviate the risk of any such inappropriate information exchange. All but two of the CAT Chairmen also hold warrants as High Court judges in that court's Chancery or Commercial divisions and it is our experience that CAT Chairmen can be relied upon to take case management decisions that effectively deal with

[7] We would also expect guidance to be published by the CAT, possibly by way of an addition to its Guide to Proceedings.

the often complex issues arising in competition litigation. We see no reason why, in cases where information sharing safeguards are plainly necessary, that these could not be imposed by the CAT.

12.3 In the case of follow-on actions, any pricing information relevant to the parties' claims will be historic; indeed, it is not uncommon for the pricing information to date back as far as a decade prior to the bringing of the claim[8]. While as noted in §13.1 we are not, in principle, opposed to the collective action regime being extended to include stand-alone claims, we do not expect the extensions to the regime of the sort supported in this response to lead to a dramatic increase in the number of stand-alone cases; the less burdensome onus in follow-on cases of establishing causation and quantifying loss means these cases are likely to remain more attractive for both collective and individual actions.

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

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

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

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

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[8] It is acknowledged that the Court of Appeal's pending judgment in *Deutsche Bahn & Ors v. Morgan Crucible & Ors*, an appeal from a CAT decision, holding that the two year limitation period for bringing proceedings for damages in the CAT is unaffected by appeals of the infringement decision by other addressees, may see a number of claims brought more quickly following an OFT/European Commission infringement decision.

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

14. Opt-in or Opt-out?

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 collective actions.

14.1 It is accepted that the only collective action for a breach of competition law brought thus far (*JJB*) had a very low opt-in rate (fewer than 0.1% potentially affected). However, as noted in our response to Q9, there are a number of reasons for the low participation rates encountered in *JJB*, not all of which are directly linked to the design of the UK collective action regime. While as reflected elsewhere in this response, we are broadly supportive of a measured and proportionate extension to the current collective action model, we agree with the Government that the regime must be carefully designed to prevent vexatious or unmeritorious claims or the use of the court mechanism as a strategic tool in disputes between parties.[9]

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

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[9] Consultation §5.32.

14.3 In our view an enhanced pre-damages opt-in system could be designed so as to make significant headway on the two issues identified in §14.2.

(i) First, by allowing claimants to opt-in up until a late stage in proceedings[10], this means that the representative claimant is not required to identify a sufficiently large group of claimants before commencing proceedings. A representative claimant will be able to use the heightened publicity arising from the commencing of proceedings to attract further claimants to the action once it has been commenced. Given the complexities that arise even in follow-on actions, this would give representatives a window of at least six months (assuming the cut-off is some time prior to trial) to publicise the case and increase the class of claimants.

(ii) This in turn will make the prospects of settlement materially more attractive to a defendant (assuming the claim has a reasonable prospect of success) as the additional time given for affected parties to opt-in and the heightened publicity ought to diminish the chances of further, separate, claims being brought against the defendant(s);

(iii) Moreover, as compared with an opt-out model, it would also allow a court to accurately set the quantum of damages it orders a defendant(s) to pay, rather than having to estimate the total quantum of damages that a defendant is liable for. While in some cases, where the period of infringing conduct is quite recent and there is a relatively limited number of parties who have suffered loss and/or detailed sales records, this will be relatively straightforward, in cases which involve sales made a long time ago, estimating the total quantum of damages will be difficult.

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

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

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

enhanced opt-in system for the most part addresses shortcomings identified with the existing regime, shifting to an opt-out model would constitute an unnecessarily radical change.

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

Design Details of an Opt-Out Collective Action Regime

15. Certification

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

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

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

(i) As part of considering whether the representative claimant has sufficient funds to cover the costs of the defendant should its case be unsuccessful, we consider that the CAT should form a view as to whether an order for security for costs is

likely to be required. Such an order may well dampen a representative claimant's appetite for bringing a claim and it is preferable that representative claimants have the opportunity to reconsider commencing proceedings once the CAT has issued a (non-binding) view on the issue at certification stage.

(ii) Whether the collective action has a reasonable or arguable case on jurisdiction. If it is clear to the CAT that there is no jurisdiction for the representative claimant to bring the claim then they should decline permission to bring proceedings.

(iii) Similarly, the CAT should ascertain that the representative claimant has reasonable grounds to consider that the claim is within the relevant limitation period (within two years of the relevant date).[11] We recognise that limitation is usually used as a shield, with the onus on the defendant to plead and argue limitation as a defence; however, in the circumstances it seems appropriate for the CAT to be able to ensure that the claimant has a clear, at least arguable, basis for considering their claim to be brought within the relevant limitation period.

15.3 As we advocate the extension of the collective actions regime to businesses, but with an overwhelming focus on providing access to justice for SMEs (see response to Q11), if a representative action is being brought on behalf of businesses, then we would propose that the CAT determines whether that representative claimant (and any claimants that have opted-in at the time of certification) are appropriate businesses to be bringing a collective action for redress having regard to factors, such as: (i) whether they have the resources (within their corporate group) to bring the claim alone; (ii) the quantum of loss they are each claiming as against the costs they are likely to each incur in bringing the claim; and (iii) whether they are seeking to bring a collective action in good faith.

16. Damages

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

16.1 We do not consider that there is any role for treble or other punitive damages in a reformed collective action regime. As noted above at §10.1, significant public enforcement activity is undertaken in the UK and EU and severe fines are imposed to punish breaches of competition laws and deter would-be infringers. There is therefore no

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

justification for punitive damages to be available in the private enforcement sphere. Rather, these should be confined to compensating claimants for losses they have suffered and this is achieved by ordinary tortious damages (with costs and interest available).

16.2 Were the collective actions regime to treble or make other punitive damages available to claimants this would necessitate revisions to the public enforcement regime, namely the level of fines imposed by the OFT and European Commission for infringements of competition laws. Such revisions would be necessary to avoid double jeopardy where a defendant was punished twice for the same infringement; i.e. by the sanctioning of a fine by the OFT/Commission and then again by the payment of damages that go above and beyond the quantum required to make redress to those that have suffered harm. Indeed, this issue was considered by the High Court in *Devenish Nutrition Ltd & Ors v Sanofi-Aventis SA & Ors*[12], a follow-on claim for damages brought against the participants of the Vitamins cartel. The High Court was clear in its judgment that the claimants' claim for exemplary damages could not be allowed as it would offend the EU law principle against double jeopardy (and also risked undermining the Commission's leniency programme).

16.3 We are also concerned that allowing treble damages would have the undesirable effect of encouraging unmeritorious claims and, at the same time, bring immense pressure to bear on claimants to settle claims even when they have a reasonable defence. We also agree with the Government that the availability of treble damages is likely to incentivise claimants to frame cases as competition law cases when they should be properly brought as commercial disputes in the High Court.

16.4 We therefore do not consider that making treble (or other punitive) damages available to claimants would be consistent with the Government's stated aim of avoiding the perceived excesses of the US class action system.

17. Costs

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

17.1 We are not persuaded that there is a case for shifting away from the loser-pays rule. Cost-shifting is a fundamental part of UK litigation and is one of the most effective safeguards against the bringing of unmeritorious and/or opportunistic claims. Previous reports undertaken in relation to collective actions have similarly concluded that the loser-pays rule played an important role in a balanced system (see for example Civil Justice Commission Report 2008 and also the comments in the Jackson Report to the effect that

[12] [2007] EWHC 2394 (Ch).

one-way costs shifting has no place in commercial litigation). Moreover, while we would prefer to see the CAT taking a proactive approach towards security for costs, as an added protection in collective actions, we would also suggest that claims funders ought to be jointly liable for a defendant's costs in the event that the claimant's case in unsuccessful.

17.2 In particular, we see a need for the preservation of loser-pays costs rules in stand-alone claims whereby complex and lengthy proceedings will be commenced by claimants and, in which, it is essential that a defendant is able to fully defend himself to the best of his ability without constraints being imposed by the CAT. We are also not attracted to the use of cost-caps in collective actions (see further details below in response to Question 18).

17.3 In relation to the availability of costs in the CAT, we are concerned that if the CAT's jurisdiction is extended to allow stand-alone actions (collective and otherwise) to be brought in the CAT, then the CAT's position on the application of the loser-pays rule ought to be made more certain because, unlike the Civil Procedure Rules that govern competition damages claims brought in the High Court, the CAT Rules do not stipulate the loser-pays rule as the starting point. Rather, rule 55 of the CAT Rules grants the CAT a broad discretion in relation to awards of costs. Indeed, the CAT has stated in rulings on costs that it will not apply the loser-pays principle where this would frustrate the objects of the Competition Act.[13] The CAT has more recently expressed qualified (and somewhat uncertain) support for the adoption of a loser-pays starting point in the context of appeals brought against OFT decisions. In *GF Tomlinson Building Limited & Ors v Office of Fair Trading*,[14] the CAT stated:

> *"the starting point in appeals against a decision under the Competition Act 1998 should be that the successful party recovers its costs... an appellant who can fairly be identified as a "winner" should receive an award of costs, but will not necessarily be entitled to recover all his costs. Such an appellant may in particular be deprived of those costs which are referable to issues on which he has failed, or which were not germane to the Tribunal's decision, or which involved unnecessary prolixity or duplication. There may also be a partial or total disallowance of costs by reason of any unreasonable conduct on his part".*

17.4 In order to ensure the collective action regime is extended in a way that culminates in a balanced system, the CAT ought to start from the position of loser-pays when awarding costs, particularly so in stand-alone cases. We would therefore propose that the CAT

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[13] *The Institute of Independent Insurance Brokers v DGFT* [2002] CAT 3

[14] [2011] CAT 32

Rules are amended so as to make loser-pays the starting position, thereby bringing certainty to parties engaged in litigation before the CAT.

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

18.1 We are, in principle, opposed to the imposition of cost caps. Given the extensions that are being proposed to the collective action regime to improve access to justice for consumers and small businesses alike, we do not consider it to be in the interests of developing a balanced system to have recourse to cost caps.

18.2 In our view, where a credible case exists, the availability of ATE insurance policies will ensure access to justice. We recognise that claimants typically must satisfy an insurer that a claim has at least a 60% likelihood of success but we do not consider that this imposes an undesirable cap on access to redress. Although, following recommendations made by the Jackson Report, ATE premia will no longer be recoverable from defendants when section 29 of the Access to Justice Act 1999 is repealed next year (even in the event of a claimant's case succeeding), the cost of an ATE premium spread amongst a sizeable class of claimants ought to be very low for each of the claimants. We consider that this provides a more balanced and measured way of providing access to justice than intruding on a defendant's fundamental rights of defence.

18.3 In the event that the Government was minded to make use of costs caps in a reformed collective action regime, we consider it essential that cost caps are only used sparingly - only in those cases where access to justice would not otherwise be available and where a credible case exists. The Government has not indicated whether it considers that cost capping in such circumstances would only apply one-way i.e. the claimants apply to have a cap imposed on the defendant's costs. We consider that some degree of reciprocity is, however, required so as to ensure that the system is balanced. A cost cap on the claimants' costs would also provide it with incentives to ensure that it controls its costs.

18.4 We are firmly opposed to the imposition of cost caps in stand-alone collective actions. The complexity of issues, and the heavy reliance upon expert evidence in these cases is such that the defendant's right to a fair defence could be significantly impeded by the imposition of cost caps. If a class of claimants is sufficiently confident of their stand-alone action, then taking out ATE insurance will provide them with the necessary access to justice.

18.5 We do not have a strong view on whether it would be appropriate for claimants' costs to be met from any damages paid by a defendant(s). We note, however, that a number of practitioners and commentators have suggested that allowing legal costs to be paid out of damages funds creates potential disparities in the principal-agent relationship that exist

between claimants and the claimants' lawyers (with the claimants the principals and their lawyers the agents). Such commentary suggests that, where there are a significant number of claimants to a claim, the lawyer is in a position to pursue his or her own agenda; for example, each individual has less incentive to review the costs being incurred by the agent because they do not have a sufficient stake in the case and the arrangement provides the lawyer with incentives to settle a case and for a lower amount in order to ensure that they are paid their costs.[15] We are generally sympathetic to the views of commentators who suggest such divergent incentives potentially compromise the enforcement of the law.[16]

19. Fees of legal representatives

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

19.1 We agree with the views expressed by the Government in relation to this question. Although availability of contingency fees would be likely to make legal representation more readily available for the bringing of collective actions, we consider that the misalignment of incentives as between lawyers and claimants (of the nature outlined in response to Question 18 above) are sufficient to outweigh the enhanced access to justice that might be provided. We consider that conditional fees are a more balanced way of ensuring that would-be claimants to collective actions are able to obtain adequate legal representation.

20. Cy-Près and unclaimed sums

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?

20.1 As described at §14.2 above, the third option for a form of the collective action regime is an enhanced opt-in model. One of the advantages of adopting an enhanced opt-in model is that this does not create issues with unclaimed damages of the sort the Government rightfully acknowledges would arise under an opt-out model. Under an enhanced opt-in model defendants would only be liable for damages to the class of claimants who had opted in before the relatively late stage (i.e. up to shortly prior to trial) meaning there is unlikely to be an issue with unclaimed damages.

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[15] This point was noted by the Commission in its Impact Assessment to its 2008 White Paper, "White Paper on Damages Actions for Breach of the EC antitrust rules", 2 April 2008.

[16] See, for example, Gerhard Wagner, "Collective redress – categories of loss and legislative options", *Law Quarterly Review* 2011, 127 (Jan).

20.2 In the event that an opt-out model was pursued, we do not consider that any option for unclaimed damages other than reversion to the defendant is appropriate. This is the only option which is consistent with the compensatory objectives of private enforcement of competition law. While we agree with the justification cited by the Government in favour of reversion of unclaimed damages to the defendant – the defendant's right to the money is superior to all except the injured claimants – we prefer this approach because any other approach would have a punitive effect on the defendant. We disagree with the Government's characterisation of the reversion of unclaimed damages to a defendant as a "windfall" to that defendant. In the vast majority of cases that defendant will already have paid significant fines, meaning that the interests of justice only now require that they make redress to those who seek it from them. Moreover, it is not inappropriate to require those who have suffered harm to take some personal responsibility to seek redress, particularly when access to redress is readily available, and with representative claimants required to advertise extensively the existence of the claim.

20.3 In the context of pan-European cartels, the payment of unclaimed sums to parties other than the defendant also stands to offend against the principle of double jeopardy – a defendant may be required to pay damages which are not claimed in the UK but are then sued for in another EU Member State.

20.4 We further note that distribution of unclaimed damages to parties in place of claimants (be they a specified body such as the Access to Justice Foundation or a party identified under the Cy-Près model) is likely to disincentivise defendants from settling a case. We also acknowledge the administrative difficulties potentially associated with administering unclaimed damages to third parties, particularly under the Cy-Près doctrine.

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?

21.1 While we consider the work carried out by the Access to Justice Foundation to be a worthwhile and beneficial cause, as we are in principle opposed to unclaimed damages being disbursed to any party other than the defendant, we cannot express a view on the suitability of the Access to Justice Foundation as a destination for unclaimed damages.

22. Private collective actions

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?

22.1 In the event that an opt-out model was adopted, we agree that opt-out collective actions for breach of the competition law should be able to be brought by private bodies as opposed to granting such rights solely to the OFT (soon to be CMA).

22.2 We share the Government's concern that granting the right to bring collective actions to the competition authority would not improve access to redress for parties that have suffered harm arising out of breaches of competition law. The OFT simply does not have sufficient resourcing to maintain a dual role of public enforcement, including the detection, investigation and sanctioning of breaches of competition law, while at the same time taking the lead in administering and running actions on behalf of consumers/SMEs to seek redress for breaches of competition law.

22.3 We similarly agree that private citizens are likely to be better placed to know where anti-competitive behaviour is causing them harm and to weigh up the relative costs and rewards of pursuing a private action seeking redress. It is difficult for the OFT to stand in such parties' shoes and make such an assessment and it is undoubtedly an inefficient use of public resources. Moreover, retaining a split between public and private enforcement, as is currently the case, ensures that the OFT/CMA is focused on sanctioning breaches of competition law through the imposition of punitive measures such as fines, leaving private enforcement competition law to focus on obtaining redress for those harmed by breaches of competition law.

22.4 In supporting the extension of collective actions to private bodies, we note that a single body, or a small number of bodies, is unlikely to provide an appropriate representative claimant in what is potentially a vast number of cases. Indeed, as noted at §9.5 we consider that the current collective action regime is hampered by the fact that there is only one representative body (Which?) designated by the Secretary of State to bring representative actions under s47B of the Competition Act. Although it achieves less overall certainty, we are therefore minded to support an approach which assesses the appropriateness of a representative claimant on a case-by-case basis. The class of representative claimants should, however, be limited to those who have a reasonable basis for alleging that they have suffered harm that was caused by the relevant infringement of competition law. We recognise that this places a significant onus on the CAT to carry out a thorough and rigorous assessment of the representative claimant at the certification stage. For this reason, we have proposed further aspects to the certification process (see §15).

22.5 To give prospective representative claimants some guidance as to what factors will be considered in assessing whether they are a sufficiently representative claimant for a particular class of claimants, we would expect guidance be published by the CAT, possibly by way of an addition to its Guide to Proceedings.[17] This could set out the CAT's approach to issues such as when representative claimants are representing a class of claimants comprised of different constituents – for example consumers and SMEs. Publication by the CAT of certification orders would also provide guidance on issues arising in the certification process.

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?

23.1 We see this issue as being split between, on the one hand, opening up access to redress through incentivising lawyers and funders and, on the other hand, creating a system where the incentives of lawyers or commercial funders of litigation are prone to diverge with those of the parties they are representing.

23.2 In our view, issues associated with the latter risk creating a commercially driven "litigation culture" of the type the Government is anxious to avoid. Ultimately we consider that the advantages of further access to redress are outweighed by the risks of undermining the integrity of an extended and reformed collective action regime that might come about through allowing funders and/or lawyers to act as representative claimants. We are confident that other options such as ATE insurance, and widening collective actions to certified private representative claimants (so long as they too have suffered loss), will provide adequate access to redress for those harmed by breaches of competition law.

23.3 We are therefore opposed to allowing legal firms and/or third party funders to bring collective cases as representative claimants. We note though that the underlying commercial reality behind cases brought by directly representative claimants means that lawyers and/or funders will often effectively run such cases on a day to day basis and be deeply embedded in the strategic decision making that shapes the direction of the proceedings.

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[17] Competition Appeal Tribunal, Guide to Proceedings, October 2005.

Encouraging Alternative Dispute Resolution

24. Should ADR be made mandatory?

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

24.1 We agree that ADR in competition private actions should be strongly encouraged to settle disputes at the earliest opportunity. Mediation can be a particularly important form of ADR in suitable cases. Properly conducted mediation enables many disputes to be resolved at less cost and greater satisfaction to the parties than pursuing the matter through litigation. Many disputing parties are not fully aware of the benefits to be gained from mediation and may therefore dismiss this option prematurely.

24.2 While it would be beneficial for a pre-action protocol to encourage or draw attention to ADR, little would be achieved by making ADR compulsory especially in situations where the parties are not in a position to agree. In the case of mediation, (except in a limited number of cases) the costs of the mediation are borne by the parties, usually in equal shares. If mediation was mandatory, it would be unfair to impose the costs of the mediation on both parties even when one party does not want to mediate. In the context of a collective action, the obligation to pay a share of the costs could deter potential claimants from joining the action. We are therefore of the view that ADR should not be made mandatory.

24.3 In any event, it is important that a pre-action protocol is not too prescriptive about when ADR should take place. In cases where, for example, mediation is deemed to be appropriate, it is important that mediation is undertaken at the right time, i.e. not too early when the parties may not have had enough time to understand each other's cases, and not so late that substantial costs have already been incurred.

25. Pre-action protocols

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?

25.1 The Government believes that one way to encourage the use of ADR in competition cases would be for the introduction of a pre-action protocol. The Government considers that a pre-action protocol would be particularly well-suited to the proposed new fast track procedure and collective actions.

(a) The proposed new fast track regime

25.2 We do not support the introduction of a new fast track regime for the reasons set out in response to Question 4 above.

25.3 Having said that, were the Government to pursue this proposal, we acknowledge that a pre-action protocol may clarify good practice and help to dissuade unmeritorious claims and vexatious litigants. However, we share the Government's concerns that pre-action protocols carry the risk of imposing unnecessary bureaucracy. Therefore any pre-action protocol that was introduced for the proposed new fast track regime should be measured against the potential delay that a pre-action protocol may introduce, thereby undermining the whole purpose of the fast-track regime. In particular we believe that provision for ADR in a pre-action protocol could seriously undermine the proposed fast track, as this would lead to delay and could discourage SMEs from seeking recourse in the CAT.

(b) Collective actions

25.4 We agree that it would be appropriate to introduce a pre-action protocol for collective actions. An emphasis on ADR in a pre-action protocol would encourage more collective actions to settle in appropriate cases before significant costs have been incurred. Provision would, however, need to be made to ensure that exceptions to a pre-action protocol were permitted where this could result in *Italian Torpedo* style pre-emptive proceedings being launched by the would-be defendant to take the claim outside of the jurisdiction of the UK courts (see §25.8).

(c) All cases in the CAT

25.5 A pre-action protocol for all cases in the CAT could (i): clarify, for the benefit of the parties to litigation, the issues that should be dealt with at any early stage; (ii) focus the parties on the use of ADR where appropriate; and (iii) could provide useful costs guidance to the CAT. However, on balance we believe that a "one size fits all" approach should be avoided. For example, a mandatory ADR requirement would be inappropriate in some cases and may actually increase the bureaucracy and therefore the availability of redress for SMEs.

25.6 Another important consideration is how the jurisdictional rules work under the Brussels Regulation. Private competition actions in Europe that have a cross-border nature could involve a number of different national courts, all of whom could potentially have jurisdiction to determine the dispute.

25.7 In order to minimise the possibility of concurrent proceedings and to prevent irreconcilable judgments being handed down in multiple Member States, Article 27 of the Brussels Regulation provides that there is no basis for a court other than the first seised to take jurisdiction where the case involves the same cause of action and the same parties.

25.8 In terms of tactical considerations, a party wishing to assert jurisdiction must strike first because any court subsequently seised of the same cause of action between the parties must decline jurisdiction and stay the proceedings in favour of the court first seised. It would therefore be impractical for a pre-action protocol to apply to all cases in the CAT, as presumably this would require a purchaser to give prior notice of a claim to the alleged cartelist, thereby giving them the opportunity to issue proceedings in a court of their choice (such proceedings commonly referred to as *Italian torpedo* proceedings).[18]

26. Enabling formal settlement offers

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

26.1 We agree with the Government that the CAT's rules of procedure should be amended in order to better facilitate the use of formal settlement offers. We believe that it would be beneficial to encourage the parties to settle to avoid the accumulation of excessive costs.

26.2 In our view, rule 43 of the CAT rules requires amendment to facilitate the use of formal settlement offers. Current problems with rule 43 include the fact that unlike part 36 of the CPR, the rule does not set out a procedure for claimants to make formal settlement offers, there is only provision for defendant settlement offers. Moreover, the following provisions in rule 43 could actually deter defendants from making formal settlement offers:

(i) rule 43 requires the offer to take the form of a payment into the court by the defendant before the offer is deemed to be valid;

(ii) the defendant is required to give an open offer to pay all of the claimant's costs which the claimant may accept up to 14 days before trial even if the claimant would have accepted the offer at a much earlier stage; and

(iii) the current formulation of rule 43 does not encourage the parties to make settlement offers.

[18] Indeed this was exactly the situation that played out in *Cooper Tire and Rubber Company & Ors v Shell Chemicals UK Limited & Ors*, a follow-on action seeking damages from members of the synthetic rubbers cartel.

27. Further encouragement of ADR

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.

27.1 We are familiar with the use of ADR in competition disputes and currently advise our clients on the appropriateness, and use, of ADR. Following the introduction of reforms to the private enforcement regime we would look to evaluate how best to serve our clients interests as regards the use of ADR.

28. Collective settlement

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?

28.1 We do not agree that, should a right to bring 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. However, as set out in our response to Question 14 above, we are opposed to the introduction of an opt-out collective action system allowing claims to be brought on behalf of a class of consumers with no requirement to name and identify the parties to the claim. We are similarly opposed to the proposal that a collective settlement process be introduced to impose binding legal settlements on an opt-out basis.

28.2 We note that the Government has considered whether it would be worthwhile introducing a legal method of collective settlement similar to the Netherlands 2005 Collective Settlement of Mass Damage Act (WCAM 2005). While we acknowledge the successes of WCAM 2005 in the Netherlands, certainly when compared to US class actions, we would advocate a cautious approach. As the Government notes, the introduction of such a system could lead to abuses of justice in the absence of rigorous judicial oversight. Even with the involvement of the court, we consider that the uncertainties under an opt-out scheme involved in identifying potential claimants and their interests would present significant difficulties when considering the fairness of a collective settlement.

28.3 In principle we are favour of measures that facilitate collective settlement where there is a system for collective actions to be brought. Therefore, we would be in favour of introducing a system for collective settlement on an opt-in basis (see also our response to Question 14 for our views on the benefits of allowing late opt-in collective actions).

29. A role for the competition authority in facilitating redress

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?

29.1 We have reservations about giving the OFT/CMA the power to unilaterally order a company to implement a redress scheme as to do so would blur the distinction between the primary objective of public enforcement, which is to deter anti-competitive activity, and that of private actions, which is to provide compensation for victims of anti-competitive behaviour. Although we recognise, for example, that one positive outcome of strong private enforcement is the creation of an additional deterrent effect, we do not consider that this should be conflated with its primary purpose.

29.2 However, we would be in favour of giving competition authorities greater flexibility to resolve cases with parties and include elements of redress in this discussion. This flexibility could be utilised to plug the existing deficit in the system without the need for litigation. In particular, we consider the 2006 English Independent Schools' fees case to be a good example of the OFT agreeing the resolution of an investigation that delivered compensation to victims without the need for litigation.[19]

29.3 As regards certification of voluntary redress schemes, we consider that this would be more appropriately undertaken by the CAT, who would be better placed and equipped to apply the necessary scrutiny to such schemes.

30. Should the fine be reduced?

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?

30.1 In our view it is important not to disincentivise parties that have infringed competition law from making early redress to those that have suffered loss. As with collective settlement arrangements, we see this as a more efficient, and therefore more desirable, means to redress than full blown litigation.

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[19] In this case the OFT reached an agreement with the schools involved under which the schools admitted the infringement, but not the effect on fees, and each paid a nominal fee of £10,000 along with a contribution to a £3 million charitable fund to be used for the benefit of affected students.

30.2 At the same time, as noted above, it is important to recognise the two distinct objectives of fines (punitive to achieve deterrence) and redress. On the face of it, this militates against competition authorities taking any redress made to victims into account when determining what level of fine to impose when the purpose of redress. The effect of this would be to conflate the entirely different objectives of deterrence and compensation.

30.3 Having weighed the policy rationale against the desire to achieve redress for victims, we can see how in limited circumstances it might be appropriate for redress to be taken into account when fines are being set by the OFT/CMA. We would envisage this being limited to situations where, as advocated in our response to Question 29, the sanctions imposed by the OFT/CMA include, in addition to or in place of fines, redress type payments such as those agreed with the OFT in the resolution of its investigation into Independent Schools' fees. Here, we consider that the early procurement of redress, particularly in cases that involve small amounts of redress to a large number of victims, justify a departure from a more principled stance of not conflating the objectives of deterrence and redress. Otherwise though, we generally agree with the Government that compensation in the form of damages, to which victims are legally entitled, should be seen as additional to, not as a substitute for the fine.

Complementing the Public Enforcement Regime

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

31.1 We consider that there is scope for an extended private actions regime to complement the current public enforcement regime in the UK.

31.2 As explained in response to Question 29 above, we consider that it is important that any model for extending the role for private actions maintains the distinction between the primary objective of public enforcement, which is to deter anti-competitive activity, and that of private actions, which is to provide compensation for victims of anti-competitive behaviour. That said, we agree with the Government that private actions complement the public enforcement regime by:

(i) increasing the deterrent effect of the public enforcement regime; and

(ii) allowing cases to be brought through stand-alone actions to address anti-competitive behaviour that is not examined through the public enforcement regime due to administrative priorities and resourcing.

31.3 We also agree that consideration should be given to how the private actions regime may be extended without undermining the public enforcement regime. In particular, concerns regarding the difficulties in maintaining the attractiveness of the OFT/CMA's leniency

programme and facilitating access to information/documentation required by would-be claimants to bring a case are an important example of the issues to be considered (please refer to our response to Questions 32 and 33 below for our views on the balance to be struck between expanding the role for private actions in the UK and protecting the OFT's leniency programme so as not to undermine public enforcement).

32. Incentivising leniency while upholding the right redress

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?

32.1 As explained in response to Question 31 above, we consider that the distinction between public enforcement and private actions is an important one. We accordingly urge that care is taken to maintain the separation between these two distinct processes.

32.2 That said, we acknowledge that the extent to which leniency documents may be disclosed in private actions is an important question and it would be to the benefit of the both the public and private enforcement regimes for greater certainty and clarity to be provided on this point.

32.3 Asymmetry of information frequently creates an evidential obstacle to building competition cases and it is in the interests of the private actions regime that measured and proportionate disclosure of documents is available to claimants. However, this interest must be balanced against the objective of protecting public enforcement through the OFT's leniency programme. We concur with the Government's view that there is a real risk that if leniency applicants are made materially more vulnerable to private actions through their participation in the programme, this will weaken the effectiveness of the programme. This would likely lead to a fall in the number of private actions pursued in competition law cases due to the knock on effect on follow-on actions.

32.4 We therefore suggest that corporate statements and other self-incriminating documents created and submitted in support of leniency applications should be exempted from disclosure. However, pre-existing documents provided as evidence in support of a leniency application should not be protected from disclosure but should be subject to the usual rules of disclosure as regards relevance; the distinction between these categories of documents being that documents within the latter category exist independently of the leniency procedure and would consequently be discoverable through other means. They should therefore not be protected from disclosure.

32.5 We also note that there are plans for the adoption of a European Directive on rules governing actions for damages for infringements of competition law, targeted for the fourth quarter of 2012, which is intended to "*clarify the interrelation of…private actions with public enforcement by the Commission and the national competition authorities, notably*

as regards the protection of leniency programmes"[20] The European Commission has also noted that individual action by Member States does not seem capable of protecting leniency programmes in any consistent manner. Notwithstanding our above views, we would therefore suggest that the Government waits to see the proposals made by the European Commission on this subject before taking any action to legislate in this area given that:

(i) the proposed Directive may be formulated to cover leniency documents provided to national competition authorities as well as the European Commission; and

(ii) even if the Directive covers only leniency documents provided to the European Commission, it is desirable that any UK rules on disclosure of leniency are consistent with the approach taken by the European Commission.

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?

33.1 We do not at this time support the proposal that whistleblowers be protected from joint and several liability. As explained in response to Question 31 above, we would caution against blurring the boundaries between the public enforcement regime and the private actions regime. In our view, the extent to which such a blurring may be justified to protect the OFT's leniency regime should be limited to the minimum needed to maintain sufficient incentives for whistleblowers to come forward through the leniency programme.

33.2 There is no clear evidence that the current joint and several liability of cartel participants is a bar to leniency applications (the OFT received applications for leniency in 20 separate cases in the period 1 April 2010 – 31 March 2011). If protection from disclosure is introduced for leniency documents (see our response to Question 32) we consider that sufficient incentives will remain for whistleblowers to use the leniency programme without the need for reform of joint and several liability in cartel cases.

33.3 In coming to this view, we also note that, in the absence of a compelling rationale for doing so, a number of other considerations also weigh against the proposed reform of joint and several liability in cartel cases. Most notably, it is not clear, in the context of pan-European cartels, how this proposal is workable if adopted on a national level; whistleblowers would not have protection from joint and several liability in other Member

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[20] See: http://ec.europa.eu/atwork/programmes/docs/forward_programming_2012.pdf

States and (provided jurisdiction can be established) could be sued there on the basis of joint and several liability for harm caused by the cartel.

33.4 The protection of one party from joint and several liability would represent a radical departure from the tortious liability principles that underpin private competition law actions (i.e. breach of statutory duty). The rationale for joint and several liability is that claimants should be able to receive full compensation for any damage suffered.

33.5 As we understand the Government's proposal, we consider that the negative effect on claimants would be twofold:

(i) claimants would be required to make a strategic decision between:

(a) incurring additional time and expense to commence separate proceedings against both the immunity applicant for damages covering its share of the cartel and one or more of the remaining cartel participants (to whom joint and several liability will attach) for the remainder of damages; or

(b) waiting for any appeal process to end and pursuing a claim against one or more non-immunity applicants for the entirety of the loss (including loss attributable to the leniency applicant), at the risk that the appeals may succeed - at which point the claimant may have become time-barred from pursuing a claim against the immunity applicant,

in either case being put at a disadvantage to their position under the current regime; and

(ii) without the protection of joint and several liability, claimants would bear the risk that compensation cannot be claimed in full from the other cartelists.

33.6 It is also very difficult to establish what a single cartelists liability is to those harmed by the cartel. Is it just the overcharge on cartelised sales it made, or, given how cartels work, is it a share of sales made by other cartelists that, only by virtue of the immunity recipient's participation in the cartel, were able to be sold at cartelised prices?

33.7 Finally, we note that this proposal has been applied in the US where it was introduced in 2004 under the Antitrust Criminal Penalty Enhancement and Reform Act 2004 (ACPERA). However, in a 2011 report on the impact of ACPERA protection from multiple damages and joint and several liability were described as being only "*slightly or moderately*

important" or "*less important than the threat of jail time or corporate fine*" when weighing up whether to apply for leniency.[21] Given the already strong leniency regime in the UK, we therefore have doubts as to the extent of the benefit to be gained to the OFT's leniency programme from removing joint and several liability for immunity applicants.

33.8 Additionally, there are important distinctions between the competition law regimes in the UK and the US, which mean that the rationale for removing joint and several liability in the US does not apply in the UK. Crucially, under US law, private actions may be brought for double or treble damages and cartel participants are prohibited from seeking contributions for damages from other cartelists. This is not the case in the UK, where damages are granted only for actual loss suffered and contribution claims may be brought against other cartelists. Consequently, both the need for protection from joint and several liability and the corresponding additional incentive to apply for leniency based on this protection are weaker in the UK.

33.9 Given the potentially limited additional benefit to the OFT's leniency programme and the disadvantage to claimants, we do not consider that removing joint and several liability of immunity applicants should be considered a priority at present. We would suggest that this proposal could instead be revisited if necessary in future once it has been seen how the Government's other proposed changes have changed the landscape of private actions in the UK.

34. Other interactions between public and private enforcement

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.

34.1 We do not consider that there are any other measures that should be taken at this time in order to protect the public enforcement regime.

Yours sincerely,

Slaughter and May

Slaughter and May

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[21] See "*Criminal Cartel Enforcement: Stakeholder Views on Impact of 2004 Antitrust Reform are Mixed, but Support Whistleblower Protection*" (July 2011) GAO Report to Congressional Committees GAP-11-619.

Slough Immigration Aid Unit

SIAU

Slough Immigration Aid Unit

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15 January 2013

Mr Tony Monblat
Consumer and Competition Policy
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Dear Tony Monblat

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

Slough Immigration Aid Unit is a charity giving specialist legal advice, help and representation in immigration, asylum and nationality law to people living in and around Slough, and their families. We are regulated by the Office of the Immigration Services Commissioner and have been in operation since March 2006. We provide all initial advice free; when we represent people's cases we do this without charge when people would qualify for legal aid, and charge those clients who would not qualify on financial grounds, on a cost-recovery basis only. We raise funds from trusts, donations and other fundraising activities and for several years staff and Trustees have joined in the London Legal Support Trust sponsored walk. LLST has drawn our attention to this consultation, in particular to questions 20 and 21 and the possibility that the proposals could result in more money going to legal advice agencies, through the Access to Justice Foundation. We support this and agree with the points made by the London Legal Support Trust.

SIAU does not have expertise in the business and legal matters which are the main subject of the consultation. But we are acutely aware of the funding difficulties for legal advice organisations, as grant-making trusts have less money, local council funding is squeezed and the scope of legal aid will be restricted after the changes in the Legal Aid, Sentencing and Punishment of Offenders Act come into force in April 2013. A further possible source of funding for advice from unclaimed compensation in group actions would therefore be very significant for many agencies and the people they serve.

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.

SIAU supports the idea of paying unclaimed sums to a single body. This would be the simplest option, to ensure that any unclaimed proceeds of actions went to benefit others who require legal help and representation. The named charity would receive funds in the public interest and would

retain its independence, not having been involved in the litigation, to make donations to the most deserving applicants in order to support other advice work.

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?

SIAU views the Access to Justice Foundation as the most appropriate recipient for two main reasons: it exists in order to support access to justice for the public, which is under threat, and it has experience in distributing grant funds. 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.

The Foundation is an independent charity and a trusted national grant maker. The Foundation's purpose is to receive and distribute funds to support free legal assistance and to support access to justice generally. The Foundation works with the regional network of Legal Support Trusts across England and Wales, and with national organisations, in order to provide strategic funding at all levels where it is needed. The Foundation is the recipient of pro bono costs under the Legal Services Act 2007, so it has experience in receiving funds from litigation and the necessary expertise when legal issues arise, as well as in dealing with inherently unpredictable sources of income. As the consultation document recognises, 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.

Please do not hesitate to contact me if you require any further clarification of any of these points.

Yours sincerely

Sue Shutter

Sue Shutter
Chair of Trustees, SIAU

South West Legal Support Trust

Patrons: Lord Phillips of Worth Matravers, HHJ Cutler CBE & HHJ Cahill QC

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Department for Business, Innovation & Skills

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24 July 2012

Dear Sirs

Private actions in competition law

On behalf of the South West Legal Support Trust, I would like to submit a response to Questions 20 and 21 of the above Consultation Paper.

Background
The South West Legal Support Trust receives grants via the Access to Justice Foundation and raises its own funds for distribution to providers of pro bono legal services in Dorset and Hampshire as well as Bristol and of course the 'real' South West down to Cornwall.

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

We view the merits of paying unclaimed sums to a single specified body as significant.

A single destination that is set out in statute would be beneficial because:

- The problem of trying to find a suitable recipient for each case is avoided, as well as the associated lobbying of judges and potential satellite litigation which would detract from both the sentiment and practical application of collective actions.
- The named charity would receive funds in the public interest and would retain its independence having not been involved in the litigation.
- A full deterrent effect against anti-competitive companies is achieved as companies practising such behaviour will need to compensate the total amount of harm the court decided was suffered by individuals from their anti-competitive action, regardless of the number of individuals who came forward to collect their damages.
- There would be legal certainty for all parties and the court, before and during litigation.
- The system is administratively simple, which would save time and cost for the parties and the court, maximising the funds available from such actions.

We view the disadvantages of the other possible options as being:

Cy-près

- There would be difficulties in identifying who is the appropriate cy-près beneficiary.
- Of the two major options for c*y-près*, the 'price roll-back' might well not benefit the previous customers harmed. Also, this might give the (anti-competitive) company an advantage over its competitors.
- The second major option to pay the residue funds to an organisation, usually a charity, considered the next best beneficiary to the harmed individuals involves the need to decide who the most appropriate recipient is. This may again place undue demands on the time and funding available.
- As mentioned previously, it has been witnessed in other jurisdictions that class-action judges are routinely lobbied by charities seeking the money, a problem reported by the Civil Justice Council in their report on collective proceedings (page 181). Furthermore, lawyers seek to suggest their personally favoured charities, which would lead to inconsistent outcomes and irrelevant favouring of particular charitable causes.

Escheat to the Treasury

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

Reversion to the defendant

- The guilty party benefits from an unjust windfall.
- Reversion creates an incentive for the company to minimize awareness of the award and the number of customers claiming.

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

We view the Access to Justice Foundation as the most appropriate recipient for two main reasons:

1. Support for access to justice

- The purpose at the heart of collective actions is to enable access to justice for individuals who would otherwise not have it, in this case from illegal anti-competitive of companies. Therefore it is logical that residue damages be used to support further access to justice for the public.
- Reductions in funding for legal assistance are having a severe impact on the availability of free legal help and therefore access to justice at all levels.
- The advice sector and pro bono sector have an increasingly vital role in providing free legal assistance to those who cannot afford it.
- The sector's work is targeted at those not currently empowered by the law whether through poverty, social exclusion, or lack of education.

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

2. The Foundation is a trusted national grant maker

- The Access to Justice Foundation is an independent charity, acting in the public interest to improve access to justice.
- The Foundation's purpose is to receive and distribute additional funds to support free legal assistance and to support access to justice generally. To this end it acts on behalf of the sector to raise money and then make grants to legal help organisations across England & Wales.
- The Foundation has a trusted role in the advice sector and legal profession, who worked together to establish the charity.
- As a national grant maker the Foundation is able to support the whole advice and pro bono sector in providing free legal help.
- The Foundation works with the regional network of Legal Support Trusts (which includes us, the London Legal Support Trust) across England & Wales, and with national organisations, in order to strategically provide funding at all levels.
- As the recipient of pro bono costs under the Legal Services Act 2007, the Foundation has experience with receiving funds from litigation and has the necessary expertise when legal issues arise as well as dealing with inherently unpredictable sources of income.
- The Foundation was recommended as a suitable body to receive residue funds from collective actions by the Jackson Review of Civil Litigation Costs, the Civil Justice Council and the HMT Financial Services Rules Committee.

Thank you for taking this response into account

Yours truly

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South West London Law Centres

Dear Sirs

Re Response to Private Actions in Competition Law: A Consultation on Options for Reform

We wish to respond to Questions 20 and 21. I am the CEO of South West London Law Centres.

SWLLC is a community based legal practice and a registered charity. Our history dates back to 1974

We work across 6 South West London boroughs (Croydon, Merton, Kingston, Richmond, Sutton and Wandsworth) helping people to understand and enforce their legal rights. In doing so, we address the root causes of social injustice – poverty, family breakdown, unemployment and exploitation. Every year, we help thousands of people from all walks of life that would otherwise be unable to afford the services of a lawyer.

SWLLC provides full legal casework, representation and advice in the following areas of social welfare law - Debt, Employment, Housing, Immigration & Asylum and Welfare Rights. We represent clients in all courts and tribunals. In 2011/12 we worked upon **3.012 cases**. We also provide the housing duty solicitor schemes at Croydon, Kingston and Wandsworth County Courts giving emergency representation in possession hearings for rent and owned homes and at the warrant stage for evictions. In 2011/12 we represented **2041** people in court.

SWLLC delivers 14 pro bono clinics per week to provide initial advice on legal problems concerned with Crime, Criminal Injury, Consumer, Employment, Family, General Litigation, Housing, Immigration, Inquests, Motoring Offences, Personal Injury, Small Claims and Wills & Probate. The overarching aim is to empower clients by encouraging them to take steps to resolve their problems themselves but advisers may also carry out a limited amount of follow-up work such as drafting documents or writing letters on clients' behalf. The work is important because addressing legal problems in their early stages can prevent them from escalating into bigger, more complex problems. In 2011/12 **4,900** people were assisted.

SWLLC delivers a significant volunteer programme. In 2011/12, 120 volunteers helped with legal work or by providing invaluable back-up and support and more than 100 solicitors and trainees volunteered to provide legal advice at our pro bono clinics.

We have already seen a significant drop in our income through the cuts and the reductions in legal aid. We have already lost a third of our income over £600,000. These proposals would help the advice sector to continue to provide our services through increased funding that the Access to Justice Foundation can make whilst our traditional funders decline. We also going to see a significant increase in demand for our services as the state withdraws funding for services from legal aid.

SWLLC 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.

SWLLC 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?

SWLLC 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.

I would be grateful if you would take these into account when considering the consultation responses.

Yours faithfully

Patrick Marples
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The 8th London Legal Sponsored Walk will take place on Monday 21st May 2012. Walkers will follow a 10km route to raise much needed funds to provide legal services to the most disadvantaged people in South West London. Please sponsor us as generously as you are able to by visiting

http://uk.virginmoneygiving.com/team/SouthWestLondonLawCentres

St. Hilda's East Community Centre

Dear Sir/Madam,

We are responding to Consultation being run by the Department of Business Innovation and Skills (BIS) concerning *Private Actions in Competition Law: A Consultation on Options for Reform*.

Re: 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. Our organisation 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.

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

I would be grateful if you could acknowledge our submission.

Thank you,

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Suzy Adcock (University of East Anglia)

Department of Business, Innovation and Skills: "Private actions in competition law: a consultation on options for reform".

Consultation response from the ESRC Centre for Competition Policy

University of East Anglia, Norwich Research Park, Norwich NR4 7TJ

Date: 24th July 2012

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The writing of the response, edited by Hviid and Peyer, is a joint effort. In two cases, questions 7 and 8, specific authors have been acknowledged.

The support of the Economic and Social Research Council is gratefully acknowledged.

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	☑

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- **The ESRC Centre for Competition Policy (CCP)**

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Introduction

The government rightly points out that there are basically two alternatives to encourage private claims. One can increase the reward by, for instance, multiplying damages or reducing the cost of bringing the case. Or one reduces the cost of enforcement actions. The fast track proposals aim at reducing cost and are a sensible proposal in the current system that is characterised by high litigation cost. Widening the jurisdiction of the CAT and trimming the procedure, especially for small-value cases, seems to be an appropriate remedy to get private antitrust litigation off the ground. Making better use of the CAT's expertise and introducing a streamlined procedure is a logical step in order to facilitate actions for consumers and small firms. Shifting the focus away from the damages remedy towards injunctions will help those firms which are interested in a quick solution to an antitrust dispute.

Before addressing those questions we feel we can contribute to, we want to highlight an important element of the consultation document. The BIS consultation document acknowledges the value of stand-alone cases in complementing public enforcement (4.8). This is a notable shift away from regarding private enforcement purely as a compensation mechanism. While not necessarily in conflict, the twin goals of deterrence and compensation do clash in a number of circumstances. The key issue to resolve in that debate is whether or not we view over-deterrence as a real problem. Recall that the idea that enforcement could be designed to deter future breaches rests on a presumption that firms undertake a cost-benefit analysis when making decisions, including on the extent and scope of their compliance programme. Fining guidelines make clear that the fine is set so as to ensure deterrence. Firms will take into consideration the full cost to them of their actions when making the cost benefit analysis. These include costs of legal representation and of private actions over and above the likely size of the fine. Unless public fines can accurately predict the

expected private damages, over-deterrence is a real issue. Only in cartel cases, where the action of forming a cartel is avoidable and where the action has no redeeming features may we be sanguine about over-deterrence. That is why the twin goals may be in conflict. In several of the questions, the answer depends more or less subtly on what the key goal is and we have tried to indicate this where appropriate. When the goal is predominantly deterrence, follow-on cases have very little merit, with the key benefits typically arising from imperfect enforcement by the initial public decision, either in terms of the size of the damages or the correct identification of the extent of the harm.[1]

I. Competition Appeal Tribunal

1. Jurisdiction

Broadening the jurisdiction of the CAT is to be welcomed. The current set-up is overly restrictive and, especially after the Enron decision, severely limits follow-on claims before the CAT. The CAT's expertise is likely to matter more in stand-alone cases where competition issues are put to test. At the moment the CAT only adjudicates damages and causation. It would be a better use of resources and expertise if the CAT was given the jurisdiction to apply the substantive competition provisions in stand-alone cases. For this reason, it would make sense to enable the courts to transfer competition cases to the competition appeal tribunal. In order to avoid the situation in which mention of a competition issue already triggers the jurisdiction of the CAT, section 16 of the Enterprise Act should be used to grant judges some flexibility in their referral decision.

As argued by Harker and Hviid[2] , for a private action to be an attractive proposition, speed and precision of a decision combined with low costs are essential. A specialist court is clearly to be preferred to a generalist court on these measures. In addition, such a court is also much more likely to be able to guard against strategic misuse of private actions.

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

Yes. Considering the CAT's expertise, this is a logical step. The proposed implementation of section 16 will provide courts with the opportunity to refer cases to the specialist CAT. However, if the proposal, as it is discussed in paragraph 4.17 of the consultation document, is implemented in its current shape, some cases may not benefit from the CAT's expertise. If our reading is correct, it appears that access to the CAT's resources for competition claims is only possible 'in certain cases where the judge is also a chairman of the CAT'. It may be useful to amend this proposal and include all cases that (partially) deal with competition law. Otherwise the use of the CAT would depend on the random factor of whether or not a judge is a chairman of the CAT. Overall, referring just the competition part of case to the CAT seems to be sensible, especially in cases where this is just one of the issues, for instance, in contract disputes.

[1] The recent Competition appeals Decision ([2012] CAT 19) in 2Travel v Cardiff Bus raises additional concerns about follow-on actions. The existing legal framework enabled the CAT to award exemplary damages in this case. If we believe that detection, punishment and deterrence is the aims of the competition authority, then their decision should be respected in a follow-on case, with any concerns over the level of punishment being dealt with through an appeal of the original decision.

[2] Harker, Michael and Morten Hviid, 2008, "Competition Law Enforcement and Incentives for Revelation of Private Information", World Competition 31(2), 279-298.

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

Yes. The very narrow definition of the CAT's jurisdiction in follow-on cases prevents use being made of its expertise in cases where, arguably, it is most needed. It also leads to wasteful litigation determining the precise binding effect of regulatory decision as, for instance, in the Enron case.[3] Stand-alone cases where the finding of a competition law infringement is crucial would benefit from the CAT's expertise.

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

Yes. The current limitations of the CAT's powers have diminished its attractiveness for claimants. Furthermore, the High Court's decision in *Purple Parking* shows that injunctions are an important element of private antitrust enforcement.[4]

2. Fast track procedure

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

The costs of litigation are likely to influence the decision of an injured party to seek compensation or an injunction. In general, fast track procedures are one possibility to overcome the cost problem (although it is only a second best solution to reforming the general cost and funding of litigation). The BIS proposals would encourage firms to bring cases against anticompetitive conduct.

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

Some of the proposed design elements may be problematic. Our concerns refer to the identification of fast-track claims, the cap on recoverable cost, and the waiver of the undertaking in damages for injunction claims.

The consultation document does not assign a maximum value for fast track cases unlike, for example, the limit that is set for small claims procedures (£5,000). Assigning a value to the case up to which fast-track litigation is available creates legal certainty as to the proceedings available for a particular claimant. The limit for cost recovery may suffice for the purpose of separating complex and complicated litigation from lower value and, maybe, easier cases. However, costs are hard to predict when an action is filed. From this perspective, it would make sense to introduce a clear limit up to which the claimant is able to bring a fast track action.

The proposed liability cap for the defendant's cost of £25,000 is also problematic (see para 4.28). As outlined above, a cost cap may help to separate SME cases from larger (cartel) cases. However, the claimant will only be liable for the defendant's cost up to the maximum threshold of £25,000 according to the BIS proposal. The defendant will be liable for any expenses that exceed the cap independent of the outcome of the claim. This is, in effect, a one-way fee shifting device for costs above the £25,000 threshold. If the defendant loses his case, the claimant's cost have to be reimbursed. However, if the claimant loses the case, he is protected from anything the defendant has spent above the threshold. This one-way fee shifting can have negative effects on the type of

[3] Enron Coal Services Limited (in liquidation) v English Welsh & Scottish Railway Limited [2011] EWCA Civ 2.
[4] Purple Parking Ltd v Heathrow Airport Ltd [2011] EWHC 987 (Ch).

cases that are brought. It encourages claimants to bring questionable cases forcing the defendant to settle for fear of rising costs. With after-the-event insurance available, the claimant may not risk much when bringing such a case under the proposed framework. If caps are applied in the suggested fast-track procedure, they should apply to both parties.

Interim injunctive relief can be a preliminary dispute resolution preventing damages from occurring in the first place or, at least, limiting them. The proposed waiver or limitation of the cross-undertaking can encourage victims of anticompetitive conduct to seek a quick dispute resolution. However, waiving or limiting the cross undertaking in damages potentially shifts costs from the applicant to the defendant. When a small or medium-sized company seeks preliminary protection against a large undertaking, the cross-undertaking covering potential costs for the loss of production may be huge depending on the sales or output. If the cross-undertaking in damages is waived, it would probably encourage firms to seek preliminary relief in those cases. However, if the defendant is a small or medium-sized business, a waiver may unduly shift the cost risks from the applicant to the defendant. Whereas a limitation of the undertaking in damages may be useful in individual cases, a complete waiver could unfairly shift the costs of an injunction when the defendant is a small undertaking.

We do think that the speed of legal proceedings matters for claimants, especially when faced with the choice of complaining to the competition authority or commencing a stand-alone action. However, it may be difficult to fix the time for legal proceedings to six months as proposed in the consultation document.

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

No additional suggestions.

II. Damages

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?

Duncan Sheehan

A rebuttable presumption of loss has one important advantage; it means the claimant does not have to prove by how much the price has risen over and above the competitive level where much of the information needed to work this out is in the hands of the cartelist. However, the assumption behind the consultation paper seems to be that there is only one potential head or type of damages in play here, so a rebuttable presumption that prices rise by 20% is at best only part of the story. The claimant, where it is a retailer (say), will be able to claim for lost profits, and in EU-related cases, this is mandated by the case of *Manfredi*.[5] Lost profits can only be worked out on the basis of the position in the retailer's (direct purchaser's) market and therefore it will have to prove the whole loss where applicable. Similarly, as a matter of common law the decision in *Devenish Nutrition*[6] to

[5] [2006] ECR-I 6619
[6] [2008] EWCA Civ 1086

the effect that gain-based damages are unavailable for competition infringements is dubious as argued by Sheehan.[7] Gain-based damages that reflect the profits that the cartelist has made rather than the losses the direct purchaser has incurred should in principle be available. Calculating those profits in cases where the cartelist might have reinvested the initial profits in other activities is far from easy, but the courts are engaged in similarly difficult calculations of the gains made in cases of infringement of intellectual property rights. We noted earlier that in cartel cases at least there is less reason to worry about over-deterrence; if the law strips the cartelist of the gains that it makes then that removes the incentive to engage in the activity, although the precise deterrent effect would be reduced by the fact that not every cartel is detected. Exemplary damages, intended purely to punish and deter, will also be available in stand-alone cases and possibly also in follow-on cases.

One question therefore that the consultation does not ask and should have done is the broader question of what types of damages should be available to a private litigant in competition cases. There appears to be an unspoken – and possibly even unconscious – assumption that a breach of competition law is different from a normal tort action. There is a risk that if labelling a case as a competition case reduces the remedies that might otherwise be available from the courts there will be an effort to relabel them as something else. If we are to treat cases differently from the norm – and particularly if we are allowing standalone cases where no public enforcement might occur – this needs to be clearly argued for. It may be, however, for example that one way of making a fast-track procedure work is to reduce the number of heads of damages available to cover only actual immediate loss, thus reducing the complexity of the economic evidence required, and the time required to complete the case.

Bruce Lyons:

On the Rebuttable Presumption of a 20% Price Rise for Damages against Proven Cartels

The consultation document includes a suggestion that there should be a rebuttable presumption that the cartel has resulted in higher prices. 20% is offered as a possible presumed increase due to the cartel. This is an excellent idea and should be widely supported. The only room for debate should be over the precise presumption to adopt and whether to extend this approach beyond cartels.

Even when a cartel has been successfully prosecuted by the OFT, the current burden of proof is that a customer seeking damages has to prove how much she has been harmed. It is as if the presumption is that the proven cartel did not raise prices. If that were true, it would make one wonder why cartels were illegal in the first place. Of course, it is not true and there is well documented evidence that most cartels raise prices very substantially. Consequently, it is both equitable and efficient to presume that a cartel raises prices.

Why does the burden of proof matter if all one has to do is look at the evidence on prices? There are two problems. First, statistical data needs to be collected, but most of this is in the hands of the cartel. Second, the data must be processed to understand the economic effects of the cartel, and there is more than one way to do this. Taken together, there is plenty of room for obfuscation and it makes it very hard work for the (often numerous) customers to prove a precise level of damages.

[7] Sheehan, D. 'Competition Law Meets Restitution for Wrongs' (2009) 125 Law Quarterly Review 222

20% will provide a focal point for a quick and low cost agreement when this is reasonably fair to both sides. It will also help the judge by providing a reasonable default if both sides get bogged down in an unhelpful destructive battle focused only on the weakness of the other's evidence.

In other areas of law, judges fully understand the principle that an informational advantage of one party should naturally lead to that party taking on the burden of proof. There is no reason not to adopt it for cartels. Competition law adopts two clear and central examples in which 'defendant' firms have to satisfy the burden of proof based on their informational advantage:

1. Article 2 of Regulation 1/2003 states: 'The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.' This is repeated in its Article 101(3) guidance. Furthermore, in its Article 102 guidance, the Commission uses wording implying a similar burden in the case of a dominant firm claiming offsetting benefits (even though there is no equivalent Article 102(3)): 'the Commission will look into claims by dominant undertakings that their [apparently abusive behaviour] may lead to savings in production or distribution that would benefit customers.'

2. Paragraph 87 of the Horizontal Merger Guidelines states clearly that the burden of proving efficiencies is on the merging parties precisely because they have access to all the relevant information:

'Most of the information, allowing the Commission to assess whether the merger will bring about the sort of efficiencies that would enable it to clear a merger, is solely in the possession of the merging parties. It is, therefore, incumbent upon the notifying parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the notifying parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers.'

As far as we are aware, these have not been challenged in the Court and are unlikely to be. More widely, the following points may also be brought into consideration:

a) In criminal law, the prosecution must place the accused at the site of the crime, but the defendant has the burden of proof if he claims an alibi that he was elsewhere at the time. This seems natural as the defendant is best placed to produce the evidence of where she was.

b) In a tort case of contributory negligence, for example, a car accident in which a passenger had encouraged a drunk driver to behave recklessly, the passenger's damages are reduced and a 50% reduction appears to be a standard starting point, even though further evidence may be used to determine a different final figure [e.g. Deakin et al 'Tort Law', OUP, 6th ed., pp899-901].

c) The doctrine of res ipsa loquitur ('the issue speaks for itself' because there is no reasonable alternative story) seems consistent with the idea we should start from non-zero damages; e.g. the cartel has been proved so this can be taken to imply higher prices.

The next issue is that if we are to presume a price rise, we need to have a suitable number to presume. Needless to say, no two cartels have exactly the same price increase, but that is not the point because the presumption is rebuttable if either plaintiff or defendant has the evidence to show otherwise. A casual thinker might claim that this requirement to specify a default number is a fundamental problem with the change in presumption from 'no harm'. This is not a serious

argument because zero is just another number but, unlike twenty, it is one that we know to be at the lower bound rather than somewhere in the middle of the true range. For the same reason, it provides a useful focus for a quick, low-cost, out-of-court agreement if 20% is 'about right' for a significant number of cases.

Is 20% the best number to use? Much of the economic evidence points to a somewhat higher average cartel effect, so I would not be averse to a slightly higher figure, but it is a cautious start that might be revised in the light of evolving evidence. As the consultation document notes, it also has the virtue of being the number I suggested when making the case for a rebuttable presumption in my response to last year's European Commission consultation on its draft guidance paper on the quantification of damages.

My one serious concern with the BIS proposal is in an important footnote attached to the relevant section (starting #4.40). This states that references to cartels should be taken to refer to any breach of the Chapter 1/Article 101 prohibition on anticompetitive agreements. This goes too far. In the case of cartels, damages in addition to a fine have a positive effect on deterrence. This is because the probability of detection times the size of fine is likely to be less than the payoff to cartel formation. Even in the unlikely event that it is not, there is no competition downside of excessive deterrence of cartels. However, where the main offence is an exclusionary practice, as opposed to exploitation of consumers, there is neither economic evidence to support the 20% figure nor a strong presumption of under-deterrence.

In particular, there is a substantial danger of chilling competition in the context of business practices that may result in foreclosure but in other circumstances may be pro-competitive (e.g. quantity discounts, exclusive dealing). Excessive deterrence is possible if the penalties of a business practice are seen to be large in one case where it is anticompetitive, and consequently other businesses play safe in avoiding the practice in circumstances where it would be pro-competitive. Furthermore, the reward of damages can act as an incentive for a weak competitor to threaten a private action in order to induce a strong competitor to compete less aggressively. This does not mean that there should be no damages actions in foreclosure cases. However, alongside the informational advantages a competitor is likely to have in relation to the relevant calculation of damages (relative to the information available to customers), it does suggest that courts might reasonably place the burden of proof on the plaintiff (i.e. foreclosed firm) in quantifying damages above zero.

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?

Deterrence	Compensation
(Hviid) If the aim is deterrence, stand-alone cases should be promoted. This involves incentivising those with the best information and strongest claim to act on behalf of society. These will typically be direct purchasers. This is recognised in the US decisions which give rise to the "no passing on defence" and with standing to bring a case limited to direct purchasers. An unresolved issue is to what extent a reward paid to the direct purchasers is passed on to the indirect purchasers. This partly depends on the nature of the reward and partly on what we believe about capital markets. If capital markets are not perfect, even a lump-sum payment to the direct purchasers may have beneficial effects down-stream if the payment is used to fund cost reducing or quality enhancing investments.	(Sheehan) Under current English law (as discussed by Sheehan[8]) there is no defence of passing on as such, but the law does have a mechanism for allocating losses between levels of claimants. From a compensatory standpoint this is required. The US Federal system referred to in the deterrence box fails to ensure that the person who suffers the loss obtains the compensation. The way in which this works is that the indirect purchaser piggy-backs his claim for loss on the top of the direct-purchaser's claim. The direct purchaser retains some incentive to sue because it will retain the right to a gain-based remedy where the infringer has made a profit over and above the losses compensated. In cases where the direct purchaser is disinclined to sue, and there is evidence and literature describing when this might be, the indirect purchaser will be able to force the direct purchaser to do so. Any exemplary damages that might be available in a standalone case will also go to the direct purchaser. It was previously suggested that an unasked question that needs to be considered is precisely what types of damages ought to be available to a competition claimant. The availability of these other measures of damages to the direct purchaser, but critically not the indirect purchaser, will preserve the former's incentive to sue, and therefore the deterrence effect of the regime. Without consideration of these matters in the round any legislative intervention to change the law is likely to be piecemeal, have unforeseen effects, and encourage attempts to force cases in or out of the regime for purely tactical purposes. The current model that the law uses has other advantages – it is consistent with wider private law analyses and therefore there is less incentive to try to get into or out of a special competition law regime. Further the defendant is not put to trying to get statistical and other evidence about the direct purchaser's business and what prices it might have charged had there been no infringement – information he does not have.

[8] Sheehan, D. 'Passing on, Indirect Purchasers and Loss Allocation between Claimants' [2012] Lloyds Maritime & Commercial Law Quarterly 261

It is likely valuable to split proceedings in private actions between establishing liability and damages, on the one hand, and distribution of proceeds, on the other. The court is well placed to deal with the first questions, but for the division of the overall damages to be done with any degree of accuracy is a much more involved process and almost invariably requires the use of experts. While estimating elasticities provides a first step in such a division, the principle of the duty to mitigate losses likely apply, requiring the adjudicator to assess likely substitution possibilities. It is important that the reason for liability and total damages is well understood not just by the defendants, but more generally to ensure that the decision adds to deterrence. The same cannot be said for the division of the damages, especially where there is a chain of indirect purchasers and the main issues may be how to divide the damages fairly among those harmed.

III. Collective actions

Given that the harm from breaches of competition law in many cases is spread over many individuals and for each of these is relatively modest, if compensation in competition cases is desirable, some form of collective redress is essential. The added value of collective redress depends on a number of parameters including the objective of the enforcement system, the actors who are allowed to bring collective actions, the choice of claim aggregation mechanism (opt-in or opt-out), the incentives to bring a claim provided in a given legal system, and the cost resulting from a system of collective redress. However, there are also doubts as to the merits of collective actions. The example provided in Box 4, price fixing of toys, exemplifies the issue. Assuming that an opt-out action was successfully brought on the back of the government intervention against Hasbro, Argos and Littlewoods, how would the damages award be distributed? The costs of distributing the award are likely to be higher than the individual loss of each consumer which the consultation documents states to be just a few pounds per individual. If the damages award is used for consumer education instead, the goal of compensation becomes less credible. In cases where the individual amount of damages is very low, collective actions are a device to skim off part of the profits from the infringer but are unlikely to achieve redress.

Since follow-on actions lead to a duplication of disputes – the same case was scrutinised by the competition authority and, normally, the appeal court – it may be worth considering empowering the NCAs to include agreements on damages in any settlement procedure. This could include setting up a cy pres award where the total harm is easy to calculate but where the victims are hard to identify. It is also worth considering whether it is appropriate to disgorge some of the fine to compensate easily identifiable victims of the anti-competitive act. This would be a better, more cost effective, alternative to running the case again as a follow-on litigation. The actual design of a system where the NCA rather than a court set compensation may be quite complicated and would need careful consultation.

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.

No views

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 Government's plan to introduce a collective action mechanism just for competition law begs the question in what respect competition law differs from other areas of law. In consumer law or environmental law illegal conduct may violate the rights of a multitude of individuals who suffer small individual harm. If collective actions are thought to be an appropriate tool to address the problem of dispersed losses, it may be useful to use a consistent approach across different areas of law. Adjacent issues like, for instance, the funding of litigation are better addressed for a number of torts instead of solely competition law.

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

It is not obvious that collective redress should be open for SMEs in competition cases. Such cases would raise serious concerns about concerted practices because they afford firms in otherwise competitive industries the means to get together and legally discuss economic matters including how they deal with either suppliers or buyers. There is clearly a serious risk that this can lead to agreements or concerted practices which would violate Article 101 TFEU or chapter 2 of the Competition Act, or even worse the sort of tacit understanding which competition law is not well equipped to tackle. Where the buyer or supplier is a dominant firm it may be that the collection of SMEs could be given immunity from competition law because they are simply providing countervailing power to the dominant firm, but the conditions under which this would be advisable would need very careful consideration. Note also that a collective action requires that the individual parties have identical or very closely related interests and concerns, exactly the case where the danger of coordinated effects, if there is a coordinating device, would be most harmful.

The key question when deciding on extending collective actions to businesses is surely why this is needed. Why are small businesses not able to fund appropriate litigation? As argued elsewhere, the key to boosting relevant private actions is to keep costs low. Moreover, opening the possibility of collective redress will require careful consideration of where the line should be drawn. Just small firms? Sole traders? Partnerships?

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

Information sharing would be a problem if undertakings were allowed to bring collective actions. It is doubtful that the case management powers of the court or CAT would be able to prevent parties from sharing information. This provides a separate reason for not extending the collective action option to businesses.

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

Assuming that the competition authority has the powers and abilities to impose appropriately deterring remedies, pure follow-on cases would add nothing positive to deterrence but mean duplication of enforcement efforts. They would limit the scope of strategic litigation aimed at distorting future competition, but not necessarily non-meritorious litigation.

Collective action enables small claims to be "consolidated" and increases the likelihood that such litigation is successful. Hence if the aim is purely or predominantly compensation, then some form of

collective action is not just desirable but also necessary. An open question is whether there are better ways to aggregate the claims. Otherwise, allowing collective action in follow-on cases mainly wastes resources and increases legal bills and insurance premiums.

Where stand-alone actions are aimed at least in parts at compensation, collective action should be allowed. Note that stand-alone actions contribute to both deterrence and compensation, but they are also more costly to finance and hence a collective action will be much more essential to get such cases off the ground.

The key concern here as in question 12 is who should have standing to bring such an action.

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 key concern for a collective action is the funding thereof. Opt-out actions ensure a greater class and hence make access to funding more likely. However, it is questionable whether the case management of the CAT can prevent or limit strategic litigation in an opt-out class action. The answer also depends on whether or not standing is limited to consumer claims. Designing the system with the necessary safeguards would be considerably more difficult if businesses were also given standing to bring opt-out collective actions. Finally, the relative merits of opt-out collective actions are determined by the ability to compensate consumers if compensation is the aim of collective actions. Compensation in class actions depends on how the reward is distributed to affected individuals. Thus, the efficacy of collective actions does not only depend on the choice of the claim aggregation model (opt-in v opt-out) but also on the distribution of the proceeds. Overall, opt-out class litigation may do better gathering a critical mass of individual claimants but this may not have much merit if consumers do not receive redress.

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

As argued above, extending the collective action option to businesses brings added complications to procedures and rules and increases the cost of enforcement without commensurate benefits. Once collective actions are restricted to consumer claims, then the list of six bullet points in A.3 appear sensible.

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

If the aim of private antitrust enforcement is compensation, there is no need to consider multiple damages awards. If instead the aim is to enhance enforcement and deterrence by delegating some of the enforcement to (groups of) private individuals, then one could possibly argue in favour of a multiplier to increase incentives, but it may be advisable instead to resort to the current common law on punitive damages.

It may be sensible to allow for a later introduction of a damages multiplier if future analysis of the number and type of cases indicates an inadequate level of desirable private actions.

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

Yes, there should be no exception to the loser-pays principle. This principle reduces the risk that cases with few merits are actually brought. Any type of fee shifting incentivises not only ‘good’ actions but also questionable cases.

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

Two reasons are commonly offered for asymmetric fee shifting. One is that we want to incentivise private litigants and one way fee shifting reduces the risk they face. This argument is particularly compelling when the law is new and not well understood or the courts are not experts, thereby increasing the risk of an adverse decision. The other is that the case may settle or clarify the law to the benefit of future enforcement. This type of positive externality benefits society but not the litigant and hence the litigant does not have the right social incentives to bring the case.

The answer depends partly on the division of labour between public and private enforcement. If the competition authority is tasked with clarifying the law and supporting the courts in their decision making through, for example, amicus briefs, the externality and risk is basically dealt with by the public authority and there is no argument in favour of limiting the loser-pays rule. If we expect private actions to "improve" or clarify the law, then there may be a case for encouraging litigants through asymmetric cost shifting. This may be plausible. At present the precise shape of the private law rights litigants have in competition law does seem relatively badly understood.

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

In particular if the aim is compensation and if the cost of litigation cannot be brought down dramatically, then to be serious about private action, these must be financed in some way. The Jackson report makes clear the good and bad sides of conditional and contingent fee systems. It is hard to see how large scale antitrust cases could be funded without some sort of bounty scheme.

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

This depends on the aims of the specific body. The unclaimed sum should in some way benefit the overcharged consumers. This would make options "b", "c" and "e" less attractive. Option "a" offers more flexibility than "d", but this depends on which scheme is named and what it would spend the money on. The remit should be broad enough to include competition advocacy and education as well as research funding.

As a researchers we have a special interest in future research funding resulting from unclaimed sums not being ruled out. From our experience, it is important to have ongoing research in an area where there are a lot of unexplored issues, in particular at a time where public funding for such research will be under threat.

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 document mentions the Access to Justice Foundation as a potential recipient under "d". This foundation has a very narrow aim and would for example not include competition advocacy and education or research funding; something which we understand happens with some US cy pres funds. We do not believe that the Access to Justice Foundation with its current remit would be appropriate, but neither are we aware of a current suitable alternative. It maybe that a new body would have to be set up.

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 some of our answers indicate, to set up a system which is workable requires a number of procedural rules to be in place, many of which have possible adverse effects as well. Since such private bodies are going to face less public scrutiny than a competition authority, there is a real danger of unintended consequences from granting private bodies such ability. Since the government has indicated that it does not intend to devote resources to ensure compensation or redress for consumers, consumer bodies could be assigned with this task. This compromise limits the number of private bodies that can bring actions which, in turn, may help to build up expertise in those organisations. It also minimises the risk that adverse effects occur.

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

There is no point in giving the rights to entities who do not have the financial clout to bring the case to a close. One advantage of legal firms undertaking the work is that they are taking the chance of a case with their own money and hence are likely to take a more credible view of the strength of the case.

IV. ADR

The proposed encouragement of ADR contradicts the aim of speeding up proceedings, at least with respect to the outlined fast track. The Government's suggestions to promote ADR are based on the assumption that court proceedings are expensive and cannot deliver swift dispute resolutions (see benefits of ADR referred to in para 6.2). At the same time, the consultation paper promotes ideas to streamline the CAT procedure aiming at cheaper and faster legal proceedings. It is without a doubt that means of alternative dispute resolution (ADR) play a part in resolving disagreements between individuals; however, the question is what their contribution will be in a fast track procedure. The latter aims at resolving cost and time problems and so do ADR. The additional benefits of ADR in competition litigation are doubtful if parties are offered a relatively inexpensive fast track which does not preclude settlements. It would be a different matter if there was no streamlined procedure. But even in the absence of any fast-track the empirical evidence on the effects of ADR outside the competition sphere is rather mixed. The mostly US-based studies report higher settlement rates for ADR; however, there does not seem to be an agreement about the actual cost savings in comparison with court procedures. Overall, the question is why we do not fix the problem (costly litigation) but try to encourage other methods of disputes resolution?

Another disadvantage of ADR is the potential effect on general deterrence. The primary goal of private enforcement is contentious. However, independent of whether the primary goal is deterrence or compensation individual actions contribute to the deterrence effect of public law enforcement (stand-alone actions will probably add more additional deterrence). To deter future infringements, law enforcement requires a certain level of publicity. Whereas judicial proceedings are normally held publicly and, thus, send signals to firms about the consequences of illegal conduct, ADR does not produce such publicity. Negotiations between the parties are normally subject to

confidentiality and less likely to raise the awareness of competition issues unless the competition authority or an ombudsman are involved.

It is worthwhile to consider the relevance of ADR according to type of violation.

	Article 101: Cartel infringements	Article 101: Other agreements	Article 102: exploitative abuses	Article 102: exclusionary abuses
Issue for private action	Overcharge	Dispute over contract terms	Dispute over contract terms	Either dispute over contract terms or attempt to create a contract; or predation
Value and relevance of ADR	ADR not well placed to resolve dispute over how much compensation should be paid. If it was, then the dispute is over the price paid under a contract and such disputes are likely already covered by ADR.	ADR already available for contractual disputes, so adds nothing	ADR already available for contractual disputes, so adds nothing	In first case, ADR already available for contractual disputes, so adds nothing. In second case, there is no current ongoing relationship to preserve. For predation, see text below

Predation is in many ways the odd-one-out, but also the one case where ADR would be a particularly bad idea. The consultation does not say much about strategic misuse of private actions. One area of competition law where particular concern about such misuse has been expressed is predation, where a firm could initiate a case to signal to a rival that it was unhappy about the rival's new lower price.[9] Allowing horizontal rivals openly to discuss whether one or other has too low a price would itself violate competition rules.

The entries in the table serves as a reminder that many potential competition disputes are also in essence contract disputes. Since ADR is typically already used in those, raising the issue of ADR in competition cases adds nothing to those cases. In reality, the only cases where ADR would not already be in place would be where they are not really appropriate, i.e. where the issue is the lack of an ongoing relationship, not the preservation of one.

[9] See for example work by Daniel Crane such as:
Crane, Daniel A., The Paradox of Predatory Pricing, 91 Cornell L. Rev. 1 (2005-2006).

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

ADR should not be made mandatory. The aim of the streamlined CAT procedure is to grant firms and individuals quick access to justice. A mandatory and, maybe, drawn-out negotiation process would run counter to this objective.

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?

It is generally argued in the law and economics literature that settlement fails for one of two reasons. The parties have different and incompatible views about the likely outcome of litigation [e.g. both think they are more likely than not to win]. The parties have asymmetric information about either the quality of the evidence and hence the likelihood of winning at litigation or the size of the harm which can be established. Anything which aligns expectations and creates symmetry of information aids the probability that settlement occurs. From that perspective a well crafted pre-action protocol could increase the probability of settlement.

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

The rules of formal settlement offers should be extended to the CAT. These settlement offers rules provide another aid to settlement and protect the defendant against nuisance suits.

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 relevant for a research centre.

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

No view

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?

Accepting that follow-actions are costly to run, that someone in the end has to meet this cost, and that consumers are among the most likely candidates to meet this cost through higher prices somewhere, then this option should be given careful consideration. Appropriate safeguards should be put in place.

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?

Logically the answer should be yes. The cost of making redress is part of the cost of having taken the action which lead to the violation which has given rise to the redress in the first place. With a goal of ensuring that the fine deters future actions but no more, such redress should in essence be disgorged from the optimal fine.

V. Public and private enforcement

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

Although claimants' legal actions are not motivated by the additional deterrence but rather the private gain, there are cases where the private motivation to bring cases overlaps with what is desired from a welfare perspective. From a deterrence perspective,[10] the beneficial effect of private actions stems from the cases that reveal prior unknown infringements.[11] Stand-alone actions bring new infringements to light, thereby increasing the probability of detection and contributing to deterrence. Follow-on actions only contribute to deterrence if the investigation by the competition authority, including the fashioning of any necessary punishment, was inadequate.

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

Yes. Private follow-on actions against cartels benefit from leniency programmes. These actions would probably not be brought if there was not a government investigation in the first place. It is the very existence of leniency programmes that enables competition authorities to commence many of their cartel investigations. The short term gain of private access to these documents would be outweighed by the long-term loss, namely, the decreasing detection rate. A decreasing detection rate, in turn, would harm future victims and potential claimants. The Court of Justice of the European Union has stressed that the principle of effectiveness requires access to justice for claimants and does not preclude access to leniency programme. However, the principal of effectiveness may, at the same time, require that leniency programmes are protected to enable the detection of future infringements and, thus, enable cartel victims to bring their claim. Claimants in follow-on actions should not get full access to the leniency documents.

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?

As we have seen in the US with the Antitrust Criminal Penalty Enhancement and Reform Extension Act (ACPERA), it may be necessary to protect the firm who achieves immunity from public fines from the full force of subsequent private litigation.[12] The key concern for the firm who is granted immunity is that it may be jointly and severally liable for the full cartel overcharge, which if we allow opt-out collective action could be substantial. The firm who is granted immunity may be particularly vulnerable as a focus for a law suit because it has all its profits intact from the violation [hence more likely to be able to meet the demands from the litigation] and may be seen to be fair game since it has escaped from the public enforcement activity without harm.

[10] Rather than ensuring that private rights can be enforced.

[11] Harker, Michael and Morten Hviid, 2008, "Competition Law Enforcement and Incentives for Revelation of Private Information", World Competition 31(2), 279-298.

[12] There is a problem (potentially) with this, see also blog post by Sheehan. Art 1 Protocol 1 of the European Convention on Human Rights protects possessions and a chose in action, such as a private law right against a competition infringer is a possession. We do need to be careful therefore in how we protect the firm not to infringe claimants' A1P1 rights. Removing the joint and several liability of the firm would not seem to violate these rights, as the value of the rights held by the claimant is not reduced, but removing a cause of action otherwise available to the claimant probably would violate their A1P1 rights.

It may matter what courts will decide about contribution among the jointly liable firms. Existing cases are concerned with situations where the joint and several liability arises because one party is vicariously liable for the damages caused by the other so that the parties have differing levels of responsibility for the harm. In cartel cases all those jointly and severally liable engaged in the harmful act and have similar responsibilities for any harm. This may reduce or remove contribution. As shown by Hviid and Medvedev,[13] where there is no contribution, there is a strong incentive to settle early in return for revelation of incriminating information about the cartel because no later contributor can claim from the firms who had already settled. Depending on how much can be learned from the decision of the authority, the litigants may have very little incentive to settle with the firm who received immunity, leaving it last to face the larger amount of liability.

While some may argue that the need for protection of such a firm is greater in the US that in the UK because of treble damages, this does depend on whether it is really the case that the expected liability is that much greater in the US. Some have argued that because there is no pre-judgement interest in the US, depending on rates of discount used, there may be little or no difference between trebled no pre-trial interest damages and single pre-trial interest damages.

Granting this protection potentially reduces the amount of damages which can be recovered. The only argument against protecting the firm who gets immunity is that with the change in rules there is now a strong incentive for the richest firm to win the race to the authority to obtain immunity and this may leave the litigant without access to the resources of the only firm who could actually meet the full demand. Thus those harmed may be denied full compensation. For that reason, only the firm who gets immunity should be protected, but is should still be liable for the private losses it has caused.

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.

Courts as well as competition authorities do make mistakes. There is a general problem regarding the precedence set by CAT and High Court decisions in stand-alone cases and in particular where a bad precedence is being set. The CMA must have the ability and means to monitor what cases are going through the courts and the CAT and the resources to provide advice as a friend of the court through amicus briefs. Should the CMA have the power to seek a review of, or appeal, the decision in a private action?

VI Other comments

The Impact Assessment and the actual consultation document are inconsistent with regards to the aim of private enforcement. The impact report picks up on compensation whereas the consultation document promotes fairness and growth. The latter objective of a reform of private antitrust enforcement is laudable but also problematic. There is no conclusive empirical evidence that would establish a connection between more law enforcement and direct welfare effects like, for instance, growth.

[13] Hviid, Morten and Andrei Medvedev, 2010, "The Role of Contribution among Defendants in Private Antitrust Litigation", International Review of Law and Economics 30(4), 306-316.

Limitation periods

The consultation document has not covered the issue of limitation periods for follow-on cases in the CAT. The standard limitation period for tort case in the courts is six years. The CAT's limitation period for follow-on action is two years. The two years limitation period begins to run when the public decision becomes final, i.e. after any appeal period has expired or the appeal decision has become final. The two years limitation period for CAT proceedings is relatively short and has led to satellite litigation in a number of cases. If section 16 of the Enterprise Act is amended, a case commenced in the high court would benefit from the six years limitation period whereas a case that is brought in the CAT must be brought within two years. This means that claimants will be likely to commence proceedings in the High Court. In effect, this undermines the efforts to make the CAT the primary place for follow-on but also stand-alone competition actions. Particularly fast-track follow-on actions that ought to benefit from the quicker and cheaper procedure in the CAT may be time-barred in the CAT, and claimants would have to initiate their case in the High Court. The government should address this issue, maybe by adopting the longer limitation period for torts in the CAT.

Types of damages available

It is important to be clear on what sort of damages should be available in a private action. The Devenish decision discusses a number of these. The decision in the Cardiff Bus case[14] raises the question of whether or not there should ever be the possibility of awarding exemplary damages in a private follow-on action for breach of competition law. To be a follow-on claim, there must already have been an infringement decision by a relevant competition authority. Where it finds an infringement, the competition authority is tasked with designing an appropriate punishment aimed at deterring and punishing the anticompetitive conduct. When the follow-on case is commenced, the matter of punishment has already been dealt with and non bis in idem [not twice for the same] should rule out subsequent exemplary damages. To ensure the proper division of labour between public and private enforcement and to keep private actions cost effective, clarity in what sort of damages are available, and when, would seem to be essential.

[14] 1178/5/7/11 2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited. [2012] CAT 19.

The German Business Representation

Position paper

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

The Federation of German Industries (BDI) represents 38 member associations with over 100,000 industrial businesses and approximately 8 million employees. The following position paper is our contribution to the consultation "Private actions in competition law: a consultation on options for reform".

The Federation of German Industries thanks the Department of Business, Innovation and Skills for the opportunity to comment on the consultation on private actions in competition law. We will only answer certain questions of the consultation, especially regarding those that deal with opt-out collective actions.

With great concern BDI follows the ongoing discussions on the possible introduction of opt-out collective actions in competition law in the UK. BDI agrees that consumers and businesses have a right to efficient law enforcement and fair compensation for injuries resulting from violations of competition law. However, we do not think that opt-out collective actions, even as last resort, are the appropriate instrument to ensure efficient and fair compensation. On the contrary, as the US legal system illustrates, in most opt-out actions a large portion of the damages awarded is used to pay lawyers' fees and the administration of payment procedures, while victims go away empty-handed.

BDI fears that the introduction of opt-out collective actions in the UK could become a precedent in Europe and could motivate the European Commission to impose rules that go even beyond the ideas expressed in the BIS consultation paper. Our British partner federation CBI already expressed its concern that even in the UK the opt-out actions will not be limited to competition law, but will inevitably extend into other areas.

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Procedural law must maintain the balance between effective legal protection and appropriate defence. The opt-out collective action seems tailor-made to bring about an "American situation" and hence a commercially driven litigation landscape. BDI continues to reject firmly a system which in the USA has proven over the years to be a massive locational disadvantage in international competition. It is well known that some US class action law firms already set up subsidiaries in the UK.

Due to their effectiveness in terms of publicity, opt-out collective actions can be misused to harm the reputation of accused companies, cause them considerable additional damage and force them to agree to a settlement without proof that they have been justly accused. Wide disclosure provisions and the facilitation of evidence for the plaintiff can lead to inappropriate disadvantages for the defendant.

Even in the case of extremely high damages which should be distributed to the rightful recipients via funds or other procedures, only a small amount reaches the target group. A large portion is retained for the fees of legal firms and used up in paying for administration of the distribution system. In other words, the system is not very efficient: regularly, only a fraction of the amount in question is paid out to victims.

The Government of the Federal Republic of Germany rejects the introduction of collective actions in general and has in its contribution to the European Commission Consultation "Towards a Coherent European Approach to Collective Redress" in spring 2011 especially spoken out against an opt-out system[1]. In the view of our Government, an opt-out system would infringe the right to be heard, as there is the possibility that consumers or SMEs would be bound by the result of the process without knowing of its existence. The German Government also stresses that an opt-out system leads to organisational difficulties regarding the distribution of damages. If the entitiy bringing the claim were allowed to keep the surplus, the damage

1 http://ec.europa.eu/competition/consultations/2011_collective_redress/germany_ministry_of_justice_de.pdf (in German only)

claim would lose its compensatory character and become a punitive element. Aims that go beyond providing compensation for damage suffered, such as deterrence and prevention measures, are a sovereign task and should only be implemented by public authorities.

Should the BIS continue to pursue its initiative to strengthen collective actions in competition law, it must by all means avoid abusive excesses of the class action system and the introduction of US conditions in Europe. Certain minimum standards will be required to prevent this. However, the danger of US class actions is not just revealed in an overall view of all critical components. The dangers presented by individual factors must not be played down. In BDI's view, the main features to prevent a misuse of the system are the following:

- The group of claimants must be expressly identified (opt-in rule). An individual person must not become a party to civil proceedings without its knowledge. This would contradict the right to be heard under Art. 41(2) a of the Charter of Fundamental Rights of the European Union. The defendant, on the other hand, must have an overview of the group of claimants and the amount of damages it faces. Due to its major public impact, the opt-out clause can be misused to damage the reputation of the enterprise, cause it significant damage and force it to agree to a settlement. The same is true of actions in which the group of claimants only has to be "identifiable". The automatic application of the legal force of a judgment is contrary to the fundamental values of most European legal systems.

- It is also of vital importance to keep fair rules on the burden of proof, which give each party the obligation to present the facts in its favour and oblige the claimant to prove its actual individual loss instead of claiming an aggregate damage. It would provide completely the wrong incentive to encourage legal action in futile cases by obliging the defendant to present extensive documentation rather than requiring the claimant to justify its claims.

- It is essential to retain the "loser pays" principle for court costs. Providing the option of taking legal action that does not involve any financial risks would create incentives especially in collective actions, creating enormous potential for misuse. The substantive prospects for an action must always be the decisive factor in the decision to pursue legal action.

- BDI is very critical of any financing through private third parties where these third parties have a major financial interest in the outcome of the proceedings without themselves having to carry an equally high individual risk. The danger here would be that collective actions are discovered to a greater extent as a new business model, thus creating a European claims industry. A large proportion of the sums of compensation gained through litigation would then end up in the organisation of the third-party financier rather than with the victims.

- It is equally imperative to avoid contingency fees, respectively to put a ceiling on lawyers' fees. Providing the wrong incentives for lawyers and other third parties, which could lead to excesses including a "claims industry", must be rejected. Otherwise the risk would be that even in cases with extremely high damages claims, only a low proportion of the damages actually paid out would get to the victims, with a large proportion being eaten up by the administration of the pay-out procedure and the contingency fee of lawyers.

- Care must also be taken to ensure that the damages do not take on a punitive nature. This would be contrary to the fundamental concept of compensation for damage which seeks to restore the circumstances prior to the damaging event. This also means that only someone who has actually incurred damage has a right to a restoration of prior circumstances.

- Allowing the "passing on defence" enables fair compensation for damage as this is the only way of ensuring that every party in the supply chain can only enforce compensation for damage which they have incurred. Excluding this could lead to disproportionate, unjustified en-

richment on the part of the claimant if it has passed on its damage to its buyers. This would, in turn, be contrary to the law of damages which is designed to ensure compensation and the danger would arise that the defendant would be sued several times for one and the same injury which would, in effect, amount to punitive damage compensation.

- The strengthening of private claims should not endanger the effectiveness of public competition enforcement and especially of the leniency programme. In light of the "Pfleiderer" judgment, there should be explicit rules to protect leniency documents from disclosure.

We also believe that alternative dispute resolution offers considerable potential for fast and low-cost procedures and welcome the reflexions of the BIS to introduce a voluntary ADR system in competition law. The efficiency aspects of ADR systems are an incentive to promote recourse to alternative dispute resolution proceedings. Furthermore, the proceedings are less public and, due to their voluntary nature, there is inherently a greater willingness on both sides to reach agreement.

Further incentives for businesses to enter ADR proceedings could be a reduction of the administrative fine or changes regarding the rules of joint and several liability. To incentivize ADR by introducing the threat of opt-out actions, as proposed by the BIS, is in our view not the appropriate way, given the huge risks and the potential misuse of these actions.

In our view, it would be worthwhile to additionally explore further possibilities to obtaining effective redress while avoiding lengthy and costly litigation besides ADR proceedings. Since lengthy and costly litigation is embedded in the very nature of collective action mechanisms and is unavoidable due to their high degree of complexity, BIS could evaluate existing law enforcement mechanisms in other Member States and alternative proposals by leading experts in the UK.

For increased efficiency, the antitrust authority could, for example, as it is the case in Germany, be specified in competition law as always being the first port of call to collect illegal profits in mass tort cases by skimming off

any economic benefit gained by the infringer. In Germany, the economic benefit can be skimmed off by the antitrust authority (Article 34, GWB, German Act Against Restraints on Competition) or, subsidiarily, by trade associations (Article 34 a, GWB). A reimbursement mechanism protects defendants against multiple claims: sums that have already been collected in order to skim off any economic benefit are repaid in the event that compensation for damages is paid subsequently. It should be noted that currently a proposal for an amendment of the GWB suggests extending the entitlement to skimming off any economic benefit to consumer associations. In the context of such wide-ranging powers of public and private parties, a need for further collective redress mechanisms in competition law is to be doubted.

Alternatively, antitrust authorities could initially determine in administrative proceedings that there has been a breach of competition law and then give the company the opportunity to settle the cartel damage claims itself. The fine could then be fixed in light of and taking account of any compensation already made. Double sanctions and damages payments could thus be avoided. In this way, an effective mechanism for dealing with cartel damage claims could be put in place that leads to prompt restitution and that would make many lawsuits unnecessary from the outset. The latter proposal has been brought forward by leading experts in competition law in the UK.

Trading Standards Institute

Private Actions in Competition Law
A Consultation on Options for Reform

BIS consultation 2012

Response of
The Trading Standards Institute

July 2012

About The Trading Standards Institute

The Trading Standards Institute is the UK national professional body for the trading standards community working in both the private and public sectors.

Founded in 1881, TSI has a long and proud history of ensuring that the views of our broad church of Members are represented at the highest level of government, both nationally and internationally.

We campaign on behalf of the profession to obtain a better deal for both consumers and businesses.

We are also a forward-looking social enterprise delivering services and solutions to public, private and third sector organisations in the UK and in wider Europe.

We run events for both the trading standards profession and a growing number of external organisations. We also provide accredited courses on regulations and enforcement which deliver consistent curriculum, content, knowledge outcomes and evaluation procedures, with the flexibility to meet local authority, business and operational needs.

In compiling this response, TSI has canvassed the views of its Members and Advisers. The response has been composed by TSI Lead Officer for Civil Law, David Sanders. If you require clarification on any of the points raised in the response, please do not hesitate to contact David at email locivillaw@tsi.org.uk.

TSI does not regard this response to be confidential and is happy for it to be published.

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Private Actions in Competition Law - A Consultation on Proposals for Reform – BIS

Trading Standards Institute response – July 2012

The Trading Standards Institute is grateful for the opportunity to respond to this consultation. Our members employed in the public sector in an enforcement role cover a wide range of provisions to protect both business and consumers. Although not directly involved in competition matters our members employed in public sector enforcement will be acutely aware of the effects of anti-competitive practices on consumers and business alike.

The recent review by the OFT of regulation governing the sale of extended warranties on domestic electrical goods is a case in point. Although not enforcing the Regulations (The Supply of Extended Warranties on Domestic Electrical Goods Order 2005) TSI members are aware of the potential for detriment to consumers were this market unregulated as it is for misleading price displays in general. Similar parallels between competition rules and pricing rules can be seen in the relation to the price fixing of sportswear in the OFT action against JJB Sports.

Our members find it unfortunate with such parallels on consumer detriment that paragraph 5.7 states that the Government does not favour the introduction of a general collective redress system covering all sectors. This is particularly regrettable in relation to EU Regulation where the "confident consumer" foundation stone of consumer protection puts consumer empowerment above enforcement.

Furthermore, points raised in paragraphs 3.8 and 3.10, "the primary purpose of an enforcement regime should be deterrence" and "the primary need for Government is to create a framework whereby individuals and businesses can represent their own interests", are worthy of comment.

TSI totally supports the view that deterrence can only be achieved through effective regulation and enforcement. However, the enforcement world is changing and not just through the direct influence of the European Union. More emphasis is now given to civil enforcement (a move TSI supports). Decriminalisation of Consumer Protection started by the Amsterdam Treaty, giving rise to the Injunctions Directive implemented now through the Enterprise Act, emphases stopping unfair commercial practices rather than criminalising them. This has led to a much closer nexus between enforcement and redress.

Whilst this consultation acknowledges "a small role on facilitating redress" (para. 3.8) there is in fact more scope for adding consumer confidence through the ability to consider redress as part of an effective deterrence system that may prove appropriate in the present difficult financial climate. Regulators in the energy field are already benefitting consumers through their ability to accept arguments for redress from transgressor companies before considering levying any administrative penalty. It may therefore prove beneficial in

progressing an improved competition regime to consider powers for such as the OFT to be able to negotiate redress with a transgressor as well as the Competition Appeal Tribunal having powers seen as more equitable in the present climate.

The Government does propose to bring forward proposals to:-

- Establish the Competition Appeal Tribunal (CAT) as a major venue for competition actions in the UK.
- Introduce an opt-out collective actions regime for competition law.
- Promote Alternative Dispute Resolution (ADR).
- Ensure private actions complement the public enforcement regime.

The Trading Standards Institute is fully supportive of the aims of Government in this regard.

Dealing with specific questions, our answers are as follows:-

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?

TSI believes that the design elements within para 4.30 are appropriate. We do not suggest any amendments.

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

NO

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

YES

Without access to any better data than that referred to within this consultation, TSI accepts that the 20% rate is appropriate.

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

NO

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 question presupposes the answer is in fact "not very well" as the consultation favours several improvements.

In truth there is a case for regularly re-examining any system against a present environment to make sure it is fit for purpose.

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.

TSI supports the broad thrust of the proposed policy objectives. From our preamble it will be clear that we consider redress to be a fundamental objective in the process and it rightly comes first in the list.

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

YES

TSI particularly supports actions through a representative body as in the case of Which? Against JJB Sports. Such argument is more influenced by limiting spurious actions as it is by the increased value to such actions through adopting an opt-out approach.

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

NO

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.

TSI supports the Government's view (as at para 5.31) on permitting opt-out actions.

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

TSI has no particular views on this issue.

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

YES

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

YES

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

TSI believes this is a matter for the discretion of the Court.

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

YES

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

Given the Which? Action in relation to JJB Sports there is reason to believe that adopting an opt-out approach will leave awards undistributed due to a lack of response from interested parties. In the case of an undistributed fund it would be most appropriate (cy-près doctrine) to use that fund to further purposes for which theses proposed changes are made.

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.

TSI believes 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?

TSI supports the Government's argument in para 5.53 and therefore does not agree.

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?

See above.

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

There is strong pressure from the European Union to create a robust ADR system for consumer disputes and Government is already struggling to find a method of meeting its Treaty commitments on ADR/ODR within the present financial constraints.

TSI is strongly in favour of a robust and effective ADR scheme for consumers to ensure rapid and inexpensive resolutions to consumer detriment. TSI believes that as a quasi-judicial scheme the public sector is the appropriate sector to deliver a scheme that commands the majority respect of consumers and business alike.

Consequently TSI would not necessarily disagree with this question, but would be concerned that without public funding the scheme would not command the majority respect it deserves in order to succeed.

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?

TSI supports amendment for all cases in the CAT.

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

YES

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

TSI membership is for those with a strong interest in promoting a strong and fair-trading community in which consumer interests are safeguarded.

However, whilst the TSI brand is widely recognised and respected, the organisation would not be looking to develop initiatives here referred to with external funding.

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

YES

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

YES

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

YES

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

TSI supports the intentions of Government expressed at the start of the consultation document.

TSI also strives to encourage and protect consumers and legitimate business from all unfair commercial practices.

We recognise, however, that within the present financial climate public sector efforts to police the market place are necessarily restricted.

Therefore, partnership approaches benefit all and the more eyes and ears that have an effective role in redress, deterrence and the market correction role the better will be the marketplace.

Private actions clearly add to the all-round benefits of a collective approach.

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

YES, but it is for the CAT to decide.

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

NO

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.

TSI has no comment on this final matter.

TSI wishes to restate its support for the proposed measures in this consultation. Any comments are intended as constructive. It is hoped, however, that, in the interests of promoting a joined-up approach to regulation, enforcement and redress, all appropriate parallels are considered in the light of uniformity.

Trading Standards Institute – July 2012

Tunbridge Wells and District Citizens Advice Bureau

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

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

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

This response form can be returned to:

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

Please tick one box from a list of options that best describes you as a respondent. This will enable views to be presented by group type.
Representative Organisation
Trade Union
Interest Group
Small to Medium Enterprise
Large Enterprise
Local Government
Central Government
Legal
Academic
Other (please describe): Citzens Advice Bureau – charitable provider of free advice

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

Consultation questions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Answer: In my view, the merits are simplicity and volume. Penny packet distribution will be costly and inefficient and while fail to deliver sums that could make a meaningful difference in an area of need.

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?

Answer: The Access to Justice Foundation is the appropriate recipient, given its remit and standing.

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?

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

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

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

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Submitted by Simon Jeffreys, Caseworker, on behalf of Tunbridge Wells Citizens Advice Bureau, 31 Monson Road, Tunbridge Wells, TN1 1LS. Email:- sjeffreys@twcab,org.uk

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UK Competition Law Association

UK COMPETITION LAW ASSOCIATION

Consultation Response

BIS: Private Actions in Competition Law: a Consultation on Options for Reform

July 2012

1. Introduction and Overview

1.1 This document is submitted on behalf of the UK Competition Law Association ("**CLA**") in response to the consultation launched by the Department for Business Innovation and Skills ("**BIS**") on "Private Actions in Competition Law: a Consultation on Options for Reform" (the "**Consultation**") on 24 April 2012.[1]

1.2 The CLA is affiliated to the Ligue International du Droit de la Concurrence. The members of the CLA include barristers, solicitors, in-house lawyers, academics, and other professionals, including economists, patent agents, and trade mark agents. The main object of the CLA is to promote the freedom of competition and to combat unfair competition.[2]

1.3 By way of introduction, the CLA broadly welcomes the proposals to make the Competition Appeal Tribunal ("**CAT**") a major venue in the UK for private litigation based on competition law. In its twelve years of existence, it has built up a strong

[1] "Private Actions in Competition Law: a Consultation on Options for Reform", available at: http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf.

[2] Further details on the CLA can be found on our website at: http://www.competitionlawassociation.org.uk/.

reputation in its handling of appeals under the Competition Act 1998 ("**CA98**") and Communications Act 2003, applications for review under the Enterprise Act 2002 ("**EA02**"), and follow-on private actions under section 47A of the CA98. It is widely regarded as efficient, fair, and competent. It makes eminent sense, in principle, for the CAT's jurisdiction to be extended so as to make most efficient use of the resources at its disposal. As regards alternative dispute resolution "**ADR**", we agree that it should be strongly encouraged, but do not think that it should be made mandatory in competition private actions.

1.4 The CLA does, however, have a number of concerns with some of the proposals. We do not support the introduction of an opt-out regime or the adoption of a rebuttable presumption of loss. These proposed changes would constitute a radical reform of the English civil justice system and we are not convinced that the evidence shows that such changes are required or wanted. We are especially concerned that these types of changes could lead to unintended negative consequences for the English civil justice system, potentially creating a system that generates considerable income for law firms rather than representing an effective means of redress for claimants and that would place considerable pressure on defendants to settle unmeritorious claims because of the heightened litigation and costs exposure. While we agree that a fast-track mechanism of some kind may encourage small and medium-sized enterprises ("**SMEs**") to bring more stand-alone claims (with or without an application for interim relief), we are not persuaded that the model proposed in the Consultation paper strikes the right balance between facilitating access to court and ensuring that defendants are not unjustly burdened.

1.5 We expand on these points and set out our more detailed comments in response to the Consultation paper in Section 2 that follows below.

2. Specific Points on "Private Actions in Competition Law: a Consultation on Options for Reform"

2.1 This part of the response provides specific responses to the questions raised by the Consultation paper. The numbering below follows the references used in the Consultation paper.

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

2.2 In the CLA's view, the answer to this Question[3] is a clear "yes". Indeed, this is something that should have been done years ago, as various commentators have suggested,[4] including the President of the CAT itself.[5] 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, while at the same time not having the ability to receive substantive competition law issues from the High Court for determination. 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 s/he felt that there was a benefit to the CAT deciding it, that option would be available. As the Consultation paper points out, this would not necessarily result in the High Court judge losing control of the case, at least if the action

[3] The CLA notes that it would not be a question of "amending" the EA02, but rather of the Lord Chancellor using the power already at his disposal, by virtue of section 16 EA02, to make regulations.

[4] *See*, *e.g.*, C. Brown, "Section 16 Enterprise Act 2002 – Time for Activation?" (2007) 28 *ECLR* 488; A. Robertson, "Competition Law in the UK Courts: a Review of the Last 3 Years" (2009) *Comp Law* 79, 97.

[5] *See* Sir Gerald Barling's contribution to the Bar European Group *European Advocate* (Spring 2009).

had been commenced in the Chancery Division, given that all Chancery Division judges are also Chairmen of the CAT (and so s/he could continue to hear the case but in the new forum). [6] We note also that activation of section 16 would enable transfer in both directions. Given what we say about the nature of many stand-alone competition cases, it would be sensible to provide the CAT with the ability to transfer cases to the High Court.

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

2.3 We agree in principle that the CAT should be allowed to hear stand-alone as well as follow-on cases. It makes sense to deploy the CAT's resources as efficiently as possible, to the benefit of both claimants and defendants. We are concerned, however, that the Consultation paper has not given sufficient consideration to the complexity of many stand-alone cases, which often raise various different causes of action by way of both claim and counterclaim. For example, a claim seeking damages for loss caused by an anti-competitive exclusivity arrangement contained in a lease might be met with a counterclaim for monies owed under the lease.[7]

2.4 It would therefore be important to consider carefully the breadth of the CAT's jurisdiction. For example, should claimants be able to plead other causes of action alongside those relating to competition law? Should defendants be able to counterclaim based on causes of action unrelated to competition law? These issues are not discussed at all in the Consultation paper, yet they would be important practical considerations.

[6] Judges of the Commercial Court are not similarly designated and so, absent wider reform, they would not be able to continue hearing the case in the CAT.

[7] This is the inverse of the [2003] EWHC 1510 (Ch); on appeal [2004] EWCA Civ 637; on further appeal [2006] UKHL 38 litigation, in which the competition law cause of action was pleaded as a "Euro-defence" and counterclaim to the landlord's claim in respect of the lease.

2.5 In our view, it would be inefficient if a defendant were precluded from being able to counterclaim in respect of the same factual matrix. That said, the CAT itself does not necessarily have the requisite expertise to deal with non-competition law issues. One practical solution might therefore be for stand-alone cases to be reserved, in terms of chairmanship, to Chancery Division judges (all of whom are Chairmen of the CAT), sitting as usual with two wing members, at least where counterclaims are made which raise issues unrelated to competition law. Another might be to leave it to the Tribunal, where appropriate, to use its powers to transfer such cases to the High Court pursuant to the secondary legislation "activating" section 16 EA02.

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

2.6 We agree that, if the CAT is to be given a stand-alone jurisdiction, it makes sense for it also to be made a Superior Court of Record, such that it may entertain applications for injunctive relief.

2.7 One further consequence of such a reform would be that the CAT would be able to punish instances of contempt of court; that again seems to us to be sensible.

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

2.8 We agree that SMEs may currently be dissuaded from using the courts to seek redress for breaches of competition law that cause them loss. The principal hurdle, in our experience, is that of costs; the risk of a substantial liability in costs in the event that the claim fails (or is only partially successful) is a significant deterrent for most SMEs.

2.9 In principle, we agree that a fast-track mechanism of some kind may encourage SMEs to bring more stand-alone claims (with or without an application for interim relief). The difficulty, however, will lie in striking the right balance between facilitating access to court and ensuring that defendants are not unjustly burdened in the process of doing so. We are not convinced, at this stage, that the proposed model strikes the right balance.

2.10 We note that the mechanism proposed is based on the model of the Patents County Court, as it has existed since new procedural rules were adopted in 2010 and 2011, and a new judge appointed on 5 October 2010 (HHJ Birss QC).

2.11 The key procedural changes adopted by the Patents County Court in 2010 and 2011 were:

(a) increased emphasis on written submissions;

(b) no standard disclosure of documents and tightly controlled cross-examination/expert evidence;

(c) maximum damages recovery of £500,000;

(d) maximum costs recovery of £50,000; and

(e) the possibility for transfer to the Patents Court at the first Case Management Conference ("**CMC**"), having considered the parties' abilities to afford litigation and the appropriateness of the forum for the claim.

2.12 The reformed Patents County Court is very much focussed on intellectual property disputes *between* SMEs and has been widely regarded as a success over the last 21 months. This raises the question of whether a similar reform could be as successful for

competition law claims. On balance, we suspect that there would be limited benefit in simply reproducing the Patents County Court model in a competition litigation context for the reasons we discuss below.

2.13 For competition litigation *between* SMEs that are prepared to accept the limitations on evidence, there is no reason to suppose that a similar system would not be effective. In practice, however, we doubt there would be much demand for a process to deal with competition disputes *between* SMEs. The sort of case envisaged in the Consultation paper, where an SME applies for an interim injunction to stop an ongoing infringement of which it has become aware, are almost inherently confined to claims against (allegedly) dominant undertakings, or undertakings with at least some market power, which will frequently be larger enterprises.

2.14 This means that the majority of disputes would be between SME claimants and large enterprise defendants. Even in the Patents County Court, official guidance cautions that such cases may not be appropriate for the "fast-track" procedure, with it being necessary to consider "*other factors… such as the value of the claim and its likely complexity*".[8] The process is specifically designed for cases where the trial is likely to last less than two days and where there will not be a large number of witnesses.

2.15 If the same principles were applied in the proposed CAT fast-track process, we anticipate that most cases either would not be deemed by the CAT to be suitable for fast-track

[8] "Patents County Court Guide" (12 May 2011), page 5, available at: http://www.justice.gov.uk/downloads/courts/patents-court/patents-court-guide.pdf/.

treatment in the first place or (if procedurally permissible) would end up being transferred out of the fast-track at the first CMC. This would be because:

(a) such cases by their nature tend to involve extensive disclosure (the burden of which often falls heavily on the defendant);

(b) such cases tend to require consideration of significant amounts of documentary and witness evidence, and would therefore rarely be suitable for adjudication on the papers and/or following a very short hearing; and

(c) the remedies sought will, if granted, often have a broader impact on the market than the specific case (*e.g.*, injunctions mandating access to an "essential facility").

2.16 It is worth considering as an example the recent *Chemistree* competition litigation in the High Court, where a pharmaceutical distributor (Chemistree) brought competition claims against various pharmaceutical manufacturers (including Teva, Pfizer, and Roche).[9] In that case, the defendants estimated their costs at over £5 million and the claimants at £1.325 million. Although suggesting that these cost estimates were extremely high, Kitchin J (as he then was) accepted that the case raised complex legal and factual issues and ordered the claimants to pay security for costs of £450,000 to cover the period up to and including an interim injunction hearing. Security for costs of £800,000 was also required in the Teva case. It is difficult to see how this kind of competition litigation could be properly heard on a fast-track basis subject to a very low and automatic costs

[9] *Chemistree Homecare v Roche Products* [2011] EWHC 1579 (Ch).

cap. Another good example is afforded by *Purple Parking v Heathrow Airport*.[10] In that case, the claimants, which were SMEs, brought an action in relation to the defendant's abuse of a dominant position in preventing the claimants from accessing the forecourts at Heathrow Airport for the purpose of conducting valet parking services. The trial lasted for 13 days, during which time each side called eight witnesses. Again, it is hard to see how this type of case could be heard on a fast-track subject to a very low, rigid costs cap.

2.17 Rather than seeking to impose a "one size fits all" fast-track with pre-determined rigid cost caps, we would suggest that it would be much better to give the CAT flexibility to apply the approach best suited to the case at hand. Practice Directions (perhaps in the form of an amended *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.

2.18 Rather than adopting an approach too closely modelled on the system implemented by the Patents County Court, we would propose adopting an approach modelled on case allocation and the fast-track in the High Court, but with much higher case value thresholds (the current fast-track being irrelevant in almost all commercial disputes because the threshold is so low).

2.19 We would not support limiting the fast-track to SMEs, since it is liable to lead to satellite litigation over who is or is not an SME and will inevitably introduce arbitrary and unfair distinctions. We note that the Patents County Court is not actually limited to SMEs

[10] [2011] EWHC 987 (Ch).

either. We would propose, instead, that the size of the parties should be a relevant consideration in allocation (as it is in the Patents County Court), but that the complexity and value of the case should also be important considerations. Indeed, it is desirable to facilitate the quick and cost-effective resolution of simple competition disputes even if both parties are larger enterprises.

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

2.20 Turning to the design elements, we start with the proposal to "*focus on providing fast access to injunctive relief*" (para. 4.28).

2.21 Firstly, we can see no objection to giving the CAT flexibility in respect of cross-undertakings in damages. The general requirement to offer such cross-undertakings undoubtedly dissuades SMEs from seeking interim injunctions. It would be important, however, to enable the CAT to have regard to all of the circumstances, including the *prima facie* merits of the underlying claim, before deciding on whether to waive or limit the requirement of a cross-undertaking.

2.22 Secondly, it is worth emphasising the difference between <u>interim</u> and <u>final</u> injunctive relief. While applications for the former could be determined speedily, as currently happens in the High Court, claims for the latter (which will inevitably underlie the former) will need to run their course and be determined by reference to the full evidential picture, whether that be evidence of fact, expert evidence, or both. Many cases brought (or defended) by SMEs will raise complex factual, legal, and/or economic issues (the

Crehan litigation[11] is a classic example, bearing in mind that Mr. Crehan was the operator of just two public houses and therefore very much an SME) which, if they are to be dealt with justly, inevitably take time and involve considerable resource. We are concerned that the Consultation paper does not adequately reflect this reality, with the consequence that its proposals – particularly in relation to costs – leave defendants at risk of enormous costs liability, regardless of the outcome of the case itself. We also consider that in many cases it will be unrealistic to hold a trial within six months of the commencement of proceedings, particularly in cases where the disclosure process is likely to be a lengthy one.

2.23 Thirdly, and in a similar vein, the focus on injunctive (or declaratory) relief should not lull the UK Government into thinking that such cases are (always) much less resource-intensive than cases in which damages are also claimed. Determining liability is often a very complex exercise; it is in part for that reason that so many commercial trials are "split" between liability and quantum.

2.24 Turning to the question of cost-capping, we have already highlighted our concerns in this respect. If the CAT is to be given the power to impose a cap in individual cases, we suggest that the decision should not be taken at the very outset of proceedings but only once the CAT has seen the defendant's response to the claim, whether that be by way of a full defence or (say) a strike-out application. As the proposal currently stands, there is a strong risk that the CAT would be deciding on the question of cost-capping without having proper sight of the *prima facie* merits of the claim, which in our view must be an

[11] *Crehan v Inntrepreneur Pub Co Ltd* [2003] EWHC 1510 (Ch); on appeal [2004] EWCA Civ 637; on further appeal [2006] UKHL 38.

important part of the assessment. To assuage any concerns from the claimant perspective, it would be possible to provide for costs protection up until the point at which the CAT decides the cost-capping issue; *i.e.*, there could be a rule that no costs are recoverable from the claimant unless and until the claimant has decided to continue with the claim after the CAT has reached a decision on cost-capping (which it is proposed would occur at the first CMC ordinarily after service of the claim and defence).

2.25 In terms of the level at which costs should be capped, we consider that the suggested maximum of £25,000 is far too low for virtually all competition cases. The maximum should be set at a much higher level, but the CAT should be left to issue guidance as to the factors it will take into account, including the claimant's ability to pay, when assessing the level of a cap in any given case. As discussed in response to Question 4, we would propose having guidance, including case studies indicating the likely cap in a number of different situations.

2.26 As for the proposal to cap damages, we see no justification for doing so. In some cases, SMEs will have suffered considerable financial loss as a result of anti-competitive conduct. It would be contrary to principle to distinguish between SMEs depending on the extent of their financial loss. Moreover, limiting the damages will not necessarily reduce the amount of legal costs involved in trying the dispute. The value of a claim can be both a useful indicator of the complexity of a case and the amount that it would be proportionate to spend fighting it, but there is no necessary link. It would also amount to a strange and arbitrary *quid pro quo* to trade off a reduction in damages payable by a defendant (if the defendant loses) in return for a cap on costs recoverable (if the

defendant wins). The defendant with a meritorious case will almost inevitably lose out and be tempted to settle to avoid unrecoverable costs, whereas the defendant with an unmeritorious case may gain relative to the normal court process.

2.27 It would in our view be preferable to give the CAT the power simply to order that there be a split trial; this would be desirable from the perspective of efficiency and the economical conduct of proceedings, without unfairly prejudicing SMEs which have suffered considerable financial loss.

2.28 We would make two final remarks.

2.29 First, we are concerned about the impact of the introduction of a fast-track procedure on the CAT's own resources. We have not seen anything in the Consultation paper to suggest that the CAT's budget would be increased to cater for the increase in activity that it is intended would follow. In our view, if a fast-track mechanism is to work effectively, it will need the CAT to be properly resourced, such that it will not negatively impact upon the CAT's caseload more generally.[12]

2.30 Second, we would strongly counsel against giving the OFT 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 paper. Nor do we see how the Competition Pro Bono Scheme (the "**Scheme**") could be given such a power. Those advised under the Scheme are just as much clients of the lawyers who participate in the Scheme as any other. It would be flatly inconsistent with the role of such a lawyer

[12] Incidentally, this same concern (regarding resource provision) applies equally to proposals on allowing the CAT to hear stand-alone cases more generally.

to write letters to third parties other than in their capacity as representative of the client in question.

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?

2.31 We do not support the adoption of a rebuttable presumption of loss. We consider that it is problematic in a number of important respects.

2.32 First of all, the Consultation paper refers to a rebuttable presumption of *loss*, rather than *overcharge*. We consider that to be a mistake for three reasons.

(a) Cartelists are much less likely to hold evidence relating to the extent, if any, of a (direct or indirect) purchaser's loss; on the contrary, it is the purchaser who will be best placed in this regard;

(b) It would subject cartelists to a risk of double jeopardy. If direct and indirect purchasers both sue, albeit in separate proceedings, there is a risk that the courts will find that there is insufficient evidence to rebut the presumption in each case. This concern as to double jeopardy would not arise if the presumption related to the overcharge, as it would still be for each purchaser to show that it has actually suffered loss (and the extent of it); and

(c) A presumption as to the extent of loss suffered by a direct or indirect purchaser is in effect the same as introducing a presumption as to whether the passing-on "defence" is a good one (either way). This sits uneasily with the Government's view that the question of passing-on should not be the subject of any new legislation.

2.33 Second, we question whether a presumption of the amount of the *overcharge* would achieve anything of value. In particular:

(a) The overcharge is only one of a number of elements that must be determined in order to calculate the loss suffered by a claimant. In our experience, the other elements (such as the amount of loss passed-through) are at least as contentious and there would therefore be little saving in time or effort.

(b) Claimants and defendants will inevitably argue for higher and lower overcharges respectively. A professional judge is unlikely to give much weight to a presumption in the face of highly detailed and case-specific expert evidence. The presumption will therefore be superseded in every case and there will be no saving of time or effort; and

(c) If anything, a presumption may well make it harder to settle cases. Claimants and their advisers will inevitably fix on the figure of 20% as the (minimum) overcharge they will expect. Defendants, by contrast, are unlikely to be willing to offer anything like 20% as they will see that as the worst-case scenario.

2.34 In any event, we consider that the figure of 20% is far too high. It is based on research of highly questionable provenance that, for example, calculated the average in part from sources such as claimants' statements of case rather than the amounts ultimately awarded to the claimants or paid in settlement. It probably also understated the incidence of low overcharge cartels because such cartels are less likely to have given rise to legal action. Use of a relatively high figure for any presumption risks transforming the system of private actions into one which aims to punish the defendant, rather than merely

compensate the victim; as mentioned at A.6 of the Consultation paper, this latter aim of punishment is more routinely and appropriately pursued by the public competition authorities, rather than by private interests.

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?

2.35 We do not consider that there is any need to address the question of passing-on. First, and contrary to the suggestion in the Consultation paper, it is fairly clear from the case law that the extent of any passing-on of an overcharge can and should be taken into account by the court in assessing quantum. For example, in *Devenish Nutrition v Sanofi-Aventis*[13] Tuckey LJ said at para. 151 (admittedly *obiter*):

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

2.36 Likewise, in *Emerald Supplies v British Airways*[14], which concerned the question of whether an action could be brought under Civil Procedure Rule ("**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*

[13] [2008] EWCA Civ 1086.

[14] [2010] EWCA Civ 1284.

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."[15]

2.37 In our view, the approach of the Courts is the correct one. The passing-on 'defence' is not a defence properly so-called: it is simply a reflection of the principle that a claimant must prove that he has suffered loss as a result of a tort. If, say, a direct purchaser has passed on the overcharge to his purchasers without any loss in sales which would otherwise have been made, then he has suffered no loss at all.

2.38 Moreover, the Consultation paper 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, for otherwise there would be a strong risk of double jeopardy; yet, as the Consultation paper also notes, this would itself be contrary to EU law, under which

[15] *See also* the Chancellor's judgment at first instance [2009] EWHC 741 (Ch), para. 37.

any person who has suffered loss as a result of anti-competitive conduct in breach of EU competition law must be entitled to bring a claim.[16]

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

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

2.39 Questions 9 and 10 are asked against the background of putative proposals for the introduction of an opt-out collective action regime to allow businesses and consumers to obtain redress. The problem identified is focused on the landmark case in 2008 when Which? settled a representative follow-on damages claim against JJB Sports out of court (the so-called "**replica football kit**" case). This was the first and, so far, only representative action initiated under section 47B CA98. This section entitles the Government to approve certain organisations, such as Which?, to commence actions on behalf of consumers in follow-on actions.

2.40 The suggestion in the Consultation paper is that an opt-out system would allow Which? (and other designated organisations) to recover redress for consumers and businesses in a way that cannot be achieved under section 47B, at least for consumers. This may be an over simplification of the problems faced by Which? in the replica football kit case, as well as failing to recognise the arguable success of that case. The action received a great deal of publicity and that publicity was actually supported by JJB itself under the terms of the settlement. More than 600 consumers did come forward and received generous compensation payments under the settlement. Which? however, was disappointed

[16] C-453/99, *Courage v Crehan* [2001] ECR I-6297.

because the consumers who did come forward were only a small fraction of all of those who had purchased football shirts allegedly affected by the infringement. That said, it is also worth bearing in mind that a large number of consumers had already benefited from JJB's offer of a free shirt and mug. That offer by JJB may itself indicate that at least some aspects of the current representative action system are working well.

2.41 Moreover, even to the extent that the level of "take-up" in the replica football kits case might have been modest, it is not clear that this situation would be improved by an opt-out system. Although it might be possible for damages to be claimed in relation to consumers or businesses who were unwilling to come forward to make the claim at the outset of proceedings (*i.e.*, to "opt in"), there is a risk that those same consumers and businesses would still fail to receive any redress to the extent they could not be identified at a later stage (absent customer records held by the defendant companies) or if they otherwise remained ignorant of any settlement that had been achieved and from which they were subsequently entitled to claim (*i.e.*, had an opt out system been adopted). Accordingly, to the extent that consumers did not come forward to be identified perhaps owing to inertia, the low sums involved, a voluntary redress scheme offered by the defendants, or difficulties in evidencing purchase given the passing of time, an opt-out system may not always provide any greater redress for those harmed by cartel activity. In this situation, the result would be a recovery of a larger amount of damages, but without any certainty that those who suffered harm come forward to claim damages. Indeed, if unclaimed damages were to be passed to the Access to Justice Foundation, which is one of the proposals put forward in the Consultation paper, all that would be achieved is a windfall for that Foundation.

2.42 On the other hand, the CLA has previously noted that the record in the UK of a single follow-on representative consumer claim is not necessarily a strong endorsement of the effectiveness of the current regime and so there is scope for the Government to consider how it might make consumer redress more effective. We recognise that an opt-out representative regime for consumers is one (but not the only) option in this regard. However, if changes to the current regime are to be made (whether along the lines of an "opt out" model or otherwise), careful control needs to be exercised to ensure that the excesses of models in other jurisdictions are avoided. In particular, were the CAT to be given the power to certify an action to proceed on an "opt out" basis, the CLA would have particular concerns were there potential for the interests of the permitted representative class to conflict with the broader public policy objective of consumer redress. This would, in the CLA's view, militate against a certification regime of the type employed in the US jurisdiction.

2.43 In this regard, the opt-out system in the US, coupled with treble damages and special rules on costs, is designed to encourage and facilitate private enforcement of antitrust law. The US system is clearly aimed at deterrence and not only compensation. However, when considering actions that follow on from a decision by a regulator, there should be no need for further enforcement or deterrence in the UK and this should not be a consideration in designing the appropriate model for follow-on damages actions in the UK. Victims of cartels that have already been sanctioned by a UK competition authority or the European Commission should be entitled to obtain damages, but these should be directed at compensating loss suffered, rather than supplementing the public enforcement regime. It may be thought that there is still an argument in favour of further encouraging

private enforcement in relation to stand-alone damages actions. However, in the case of stand-alone actions, we would question the appropriateness of introducing an opt-out system as a means of fuelling such actions. An opt-out regime would bring about a significant change to the English legal system which could easily lead to unintended negative consequences (*e.g.*, creating a system that generates considerable income for law firms themselves rather than representing an effective means of redress to claimants and placing considerable pressure on defendants to settle unmeritorious claims because of the heightened litigation and costs exposure associated with opt-out cases), although these negative consequences could perhaps be mitigated through extremely careful judicial control and restrictions upon the type of body permitted to form the representative body. Victims of cartels that have not been penalised by a UK competition authority or the European Commission should still have a right to damages for the loss suffered, but we again believe that the current regime is adequate for this purpose.

2.44 One reason that section 47B CA98 has been used only once to date may be because of a failure to designate any representative bodies except Which?. This is something that could easily be remedied by adding additional bodies entitled to bring representative actions or by amending the regime to empower the CAT to approve representative bodies on a case-by-case basis. We would be supportive of such measures.

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

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

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

2.45 As regards Questions 11 to 13, the first point to bear in mind is that stand-alone and follow-on collective actions are currently permitted in the UK by businesses and consumers for breaches of competition law. There is no distinction between the two, save in relation to claims under Section 47B CA98. Collective actions can take one of at least three forms. The first is proceedings in the High Court under a Group Litigation Order ("**GLO**"). Pursuant to this process, a group of claimants is allowed to make a claim under the supervision of the Court to ensure that all unnecessary duplication is avoided. Usually one law firm is appointed by the High Court to take the lead. Experience of GLO litigation appears to vary, and there is a view that, because of the involvement of the Court, the proceedings are somewhat over-formalistic and procedurally "heavy".

2.46 The second possibility is a representative action in the High Court. In principle this is a convenient way of proceeding and would be attractive to those representing claimants. However, the conditions under which representative actions are allowed are narrowly prescribed. In the recent *Emerald* case,[17] the Chancellor refused to allow the representative action to proceed on the basis that the interests of the claimants were not the same. This decision faithfully followed the case law, but the basis for the judge's conclusion that the interests of the claimants in that case were not the same is not altogether clear. The purpose of the rule is to ensure that the representative action can proceed on a proper basis with the principal parties being in a position to represent the interests of the rest. It is easy to see that, if the interests of the claimants conflicted, this could not be done satisfactorily. However, there is no suggestion in *Emerald* that the

[17] *Emerald Supplies Ltd v British Airways Plc* [2009] EWHC 741 (Ch).

interests of the claimants were in fact in conflict. It is simply that the particular circumstances of the claimants differed in some respects. There was no practical reason why the action should not go forward, as is demonstrated by the fact that the represented claimants were willing to be so represented.

2.47 Moreover, even where there are elements of conflict between the claimants, it is possible to deal with this through a process of agreement amongst them. This would effectively remove elements of conflict from the purview of the court. It would therefore be sensible to reconsider the conditions under which representative actions should be allowed to proceed.

2.48 While the High Court rejected an attempt to bring a representative action in *Emerald*, it is worth highlighting that the *Emerald* action is proceeding as a form of informal GLO/opt-in case where additional claimants are added to the proceedings as the case progresses and following initiation. This appears to show that there are ways to bring collective actions within the constraints of the existing system.

2.49 A third method for bringing representative actions is in fact used by claimants' lawyers and involves an agreement between all the claimants that only a small number, say one or two, will be involved as parties to the proceedings, but that all negotiations with the defendants will be conducted equally on behalf of all. This appears to enable representative actions to proceed on an informal basis.

2.50 In our view, both businesses and consumers alike should be entitled to bring collective actions to obtain compensation for breaches of competition law. One further change that the Government might consider introducing would be to extend section 47B opt-in

representative actions to SMEs as well as consumers. Such a form of representative action could be useful where SMEs experience difficulties similar to those faced by consumers as identified in the Consultation paper (*i.e.*, where individual losses are low and dispersed). From a practical perspective, attempts to define a class of SMEs to which the representative action would apply might prove difficult, resulting in satellite disputes concerning claimants' status as SMEs. However, this could potentially be circumvented by limiting designated representative bodies to those representing SME constituents or by providing that the CAT could approve such bodies on an *ad hoc* basis.

2.51 As already discussed above in response to Questions 9 and 10, the CLA does not consider that there are grounds for introducing any new form of collective action procedure in the case of stand-alone actions given that such cases are necessarily more speculative as they are not based on a pre-existing regulatory infringement finding (which, where necessary, has been test on appeal).

2.52 Para. 5.10 of the Consultation paper refers to a concern about claimants using a representative action as a vehicle for inappropriate information sharing that might be a breach of competition law. In practice, this risk arises with a whole variety of competition-law based actions, but is always dealt with by establishment of confidentiality rings to avoid the passing of competitively sensitive information between undertakings. Such confidentiality arrangements are arranged either under the auspices of the court or even prior to the involvement of any court by the law firms themselves. There can be no basis for suggesting that this risk should mean that businesses should not be able to benefit from collective actions for damages.

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

2.53 As explained above, we consider that there are insufficient grounds for introducing an opt-out system.

2.54 As for distinctions between "pure opt-in" and "pre-damages opt-in" actions, the current situation is that additional claimants can join an action after the initiation of the proceedings. What cannot, however, happen – and for good reasons – is that damages assessed by the Court cannot be based on the existence of unknown claimants. Having said this, settlements can be arranged so as to allow claimants to be brought into the case even after the end of the proceedings. In fact, this is what happened in the replica football kits case. It seems to us correct that this should be a matter of agreement between the parties rather than imposed on defendants. In the replica football kits case, Which? made efforts to reach out to potential claimants, to make them aware of the potential for redress, and to have them join the action. If an opt-out rule were introduced, a claimant firm might be disinclined to reach out to potential claimants, instead relying on a legal rule that future claimants would be somehow be entitled to a share in the damages.

Responses to Questions in Annex A

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

2.55 As explained above, we consider that there are insufficient grounds for introducing an opt-out system. However, in case the Government decides to introduce an opt-out system, we offer our comments on this Question.

2.56 Much of the litigation in the US is focused on class certification. We see some sense in all of the six criteria set out in para. 8.3. Put another way, if any one of those six criteria were not satisfied, it may well be that the court should not be prepared to certify the class.

2.57 However, the question as to whether there is sufficient commonality of issues among the claimants should be seen in light of what is said above about representative actions. We believe that the test for representative actions is currently too narrow and should instead be based on one that focuses on any conflict between the claimants that in the circumstances would actually be before the court.

2.58 As for the requirement that the representative action be a suitable means of resolving the common issues, this appears to be a matter of common sense, but should not lead to a practice that would stand in the way of representative actions.

2.59 As for sufficiency of funds to cover the costs of the defendants, should the case be unsuccessful, the court would clearly be alive to the fact that class actions can be expensive to defend but there may potentially be other ways of addressing this issue, such as ordering security for costs.

2.60 We also believe that a number of other issues would need to be addressed at the certification stage. These include the following:

(a) Whether a claim would most appropriately be brought on an opt-out basis or whether an opt-in action would be a more fair and efficient basis on which to bring the claim. The Consultation paper at para. 5.31 states that the CAT would

have discretion to consider this issue on certification, but this does not appear to be addressed within Annex A to the Consultation paper.

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

(c) Whether there are different categories of purchaser and whether sub-class representatives are required;

(d) Whether (as part of a preliminary merits test) there is a reasonable basis for a UK court taking jurisdiction over the claim; and

(e) How to deal with potential non-UK claimants; one option might be to require would-be members of the class resident outside England and Wales specifically to opt in.

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

2.61 As explained above, we consider that there are insufficient grounds for introducing an opt-out system. However, in case the Government decides to introduce an opt-out system, we offer our comments on this Question.

2.62 In our view, there is no place for punitive damages in follow-on actions where fines have already been imposed on the relevant defendants. Punitive damages are not concerned

with redress. However, in the recent decision of the CAT in the *Cardiff Bus* case,[18] exemplary damages were awarded to reflect the disgraceful behaviour of the defendants. Without commenting on the appropriateness of the decision to award exemplary damages in that case, we feel on balance that it is better to avoid adopting exceptional rules for antitrust actions, relying instead on case law.[19]

2.63 It may also be noted that allowing treble or punitive damages would likely encourage unmeritorious claims and/or place undue pressure on defendants to settle. Indeed, the position would be all the worse in England where, unlike the US, interest rules already operate to inflate the award of damages by starting to run from the date on which the harm is suffered. Treble or punitive damages would also be taken into consideration by potential leniency applicants when deciding whether to apply for leniency and may persuade companies not to apply for leniency, thereby operating against the effective enforcement of EU/UK competition rules.

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

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

2.64 As explained above, we consider that there are insufficient grounds for introducing an opt-out system. However, in case the Government decides to introduce an opt-out system, we offer our comments on these Questions.

[18] *2 Travel Group PLC (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19.

[19] *See, e.g., Rookes v Barnard*, [1964] UKHL 1, the leading case on punitive damages.

2.65 We cannot identify valid reasons for concluding that the cost rules should be different for collective actions as compared with other actions. For follow-on actions, costs are unlikely to be awarded against claimants unless they refuse to accept an offer from the defendants that they fail to beat before the court. To suggest that, even in such circumstances, costs should not be awarded against claimants, would place defendants in an unfairly weak position and make settlement of the claim far less likely. It would therefore tend to lead to increased costs.

2.66 If the Government decides that the claimants' costs should be funded out of a damages fund, there appears to be no reason to suggest that this should not also apply to collective actions in competition cases.

2.67 We would also refer you back to our response to Question 15 where we explained that security for costs should be ordered where appropriate.

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

2.68 As explained above, we consider that there are insufficient grounds for introducing an opt-out system. However, in case the Government decides to introduce an opt-out system, we offer our comments on this Question.

2.69 We consider that there would a danger in combining contingency fees with an opt-out collective regime. Where the lawyers representing the claimants have a strong financial interest in the action, this can easily lead to conflicts of interest and further the lawyers may not necessarily act in the best interests of the claimants. Potential unwelcome

outcomes would include making settlements more difficult and lawyers seeking artificially to inflate the size of the class and the resulting damages.

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?

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

2.70 As explained above, we consider that there are insufficient grounds for introducing an opt-out system. However, in case the Government decides to introduce an opt-out system, we offer our comments on these Questions.

2.71 Should unclaimed funds arise under an opt-out system – and the US system appears to indicate that we should expect a significant level of unclaimed funds – there is no clear way in which those funds can be used to achieve the purpose of collective redress. Cy-près is a solution of last resort and will certainly not guarantee that the surplus funds are put to any relevant and useful purpose. Simply paying the money into government funds, whether to the Treasury or to the Legal Aid Fund, would simply mean that the damages would take on the character of a fine. This would, in our view, certainly be entirely inappropriate in a follow-on action where fines had already been imposed.

2.72 It has been suggested that claimants sharing would have the effect that more claimants would come forward in the hope that they would receive a windfall. Of course, insofar as the incentive succeeded, the claimants would be disappointed. Again, if the purpose of collective actions is redress, there is no basis in principle for allowing the claimants to come forward to receive a windfall.

2.73 There is some basis for suggesting that surplus funds should simply be returned to the defendant. If the purpose of the collective action is redress and redress has been provided to the claimants who wish to make the claim, justice has been done and there seems to be no reason to deprive the defendant of any funds left over. Returning surplus funds to defendants would also make sure that incentives to settle are not skewed by the significant damages associated with opt-out regimes. Not allowing for surplus funds to be returned to defendants in an opt-out regime highlights that such a regime is not concerned so much with redress, but more with other policy objectives.

2.74 It is difficult to assess whether payment to the Access to Justice Foundation would be appropriate. This would depend on the way in which such funds were administered by the Foundation, which does not appear to be particularly clear.

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?

2.75 As explained above, we consider that there are insufficient grounds for introducing an opt-out system. However, in case the Government decides to introduce an opt-out system, we offer our comments on this Question.

2.76 It appears to be generally accepted that it would be undesirable to introduce a scheme such as the one that exists in the US, where antitrust class actions appear often to be used by law firms as vehicles for generating income for themselves rather than representing an effective means of redress to claimants. If opt-out collective actions were to be introduced, it seems to us that such actions should be brought only by representative bodies with strict safeguards. In our view, such actions should not be left to a UK

competition authority to pursue, not least as this would inevitably use up scarce resource and would likely reduce the level of public enforcement.

2.77 One key concern with opt-out regimes is that they can lead to law firms or other bodies having an interest in the use of surplus funds in a situation where such an interest would be inappropriate. This Question could, however, be addressed both by limiting such opt-out actions to follow-on damages cases brought by purely representative bodies (such as Which?), as well as having strict controls over the use of any surplus funds.

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?

2.78 As explained above, we consider that there are insufficient grounds for introducing an opt-out system. However, in case the Government decides to introduce an opt-out system, we offer our comments on this Question.

2.79 If law firms and/or third party funders were entitled to bring such cases, we are concerned that, without appropriate safeguards, serious conflicts of issues could arise as between the law firms and/or third party funders and the victims of the cartel. See further our response to Question 19 above.

2.80 Another option considered in the Consultation paper entails entitling the Competition and Markets Authority to bring damages actions. However, we would have concerns in relation to a situation where the party acting for the victims of the cartel had at the same time investigated and adjudicated on the infringement in the first place. This could also reduce the incentives for companies to submit leniency applications.

2.81 Ultimately, if an opt-out regime were to be introduced, it seems to us that it would be preferable tightly to circumscribe the right to bring such actions to authorised representative bodies without any (significant) financial interest in the case and that such actions should only be brought in follow-on cases. This would permit cases to be conducted with the greatest efficiency, reduce the risks of unmeritorious claims being brought, and lessen the risks associated with claims being driven by class-action lawyers.

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

2.82 We agree that ADR should be strongly encouraged, but not mandated, in competition private actions.

2.83 ADR is widely supported as a method of reducing the cost, disruption, and delay associated with resolution of disputes through litigation. When the European Commission published a Green Paper on the more extensive use of mediation in the European Union, it received 160 responses that were almost unanimously positive about the initiative.[20] This is not surprising in circumstances where one prominent provider of mediation services estimates that over 70% of mediations it organises result in settlement of the dispute.[21]

[20] "Commission Staff Working Paper: Annex to the proposal for a directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters", COM(2004)718 final, available at: http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/sec/2004/1314/COM_SEC(2004)1314_EN.pdf.

[21] Centre for Effective Dispute Resolution: *see* http://www.cedr.com/solve/mediation/.

2.84 ADR is also particularly useful for the resolution of disputes between consumers and businesses. A 2009 study for the European Commission[22] identified that there were some 750 ADR schemes in the European Union that were relevant for business-to-consumer disputes collectively handling approximately half a million cases per year. The study's authors concluded that ADR schemes "*are indeed a low-cost and quick alternative for consumers for settling of disputes with businesses*" since most schemes incurred costs of less than EUR 50 for the consumer and provided an outcome within 90 days.

2.85 As the Consultation paper recognises (para. 6.3), it has long been UK Government policy to promote the use of ADR throughout the court system wherever it is feasible to use it and so it has become a key feature of litigation in this country. Since at least the introduction of the CPRs in 1998, following the landmark Access to Justice Report by Lord Woolf in 1996,[23] the use of ADR and mediation in particular has been actively encouraged by both legislators and judges.

2.86 For example:

(a) Rule 1.4(e) CPR makes it part of the Court's duty for furthering the "*overriding objective*" to "*encourag[e] the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure*."

[22] "Study on the use of Alternative Dispute Resolution in the European Union" (Civic Consulting of the Consumer Policy Evaluation Consortium, 16 October 2009), available at: http://ec.europa.eu/consumers/redress_cons/adr_study.pdf.

[23] "Access to Justice Final Report", by The Right Honourable the Lord Woolf, Master of the Rolls, July 1996, available at: http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/index.htm.

(b) Para. 8 of the Practice Direction on Pre-Action Conduct encourages parties to consider the use of ADR pre-action and throughout the action. In accordance with para. 4.6 of the same Practice Direction, non-compliance may be punished through costs orders, awards of penal interest or deprivation of interest and/or the imposition of a stay. Where formal pre-action protocols exist for particular types of action, it is routinely a requirement of them that the use of ADR be considered.

(c) Question 1 of the standard Allocation Questionnaire (Form N150) requires all parties to consider whether they would like a stay to try to negotiate a settlement. The Court can order a stay for this purpose even if only one party asks for it.

(d) Provisions in the Commercial Court Guide require parties to provide information about what steps they have taken to resolve the dispute by ADR or, alternatively, why ADR would not be appropriate. The Commercial Court can also order use of an ADR process or, more typically, it may order a stay to allow the parties space to try to agree the use of an ADR process. It can, by agreement, undertake an Early Neutral Evaluation itself, although we are not aware of this option ever having been used in a competition private action. The enthusiasm of the Commercial Court for ADR is of great importance in this context because, alongside the Chancery Division, it is one of the only two courts outside the CAT that can hear competition private actions.

(e) A series of judicial decisions have confirmed that it can be appropriate to impose costs sanctions for an unreasonable failure to participate in ADR processes.[24]

(f) As noted in the Consultation paper (para. 6.9), the CAT can also encourage use of ADR. Rule 44(3) of the CAT Rules 2003 (SI 2003/1372) ("**CAT Rules**") gives the CAT the power to "*encourage and facilitate the use of an alternative dispute resolution procedure if the Tribunal considers that appropriate*."[25] The CAT has used those powers in a number of cases.

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

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

2.89 In fact, it is already the case that most competition private actions are resolved by way of negotiation and/or mediation. Very few claims are litigated all the way to trial. This is the same as in other forms of commercial litigation. If there is an issue in relation to the use of ADR in competition private actions, it is not so much that it is not used but that it is typically only used after proceedings have been issued and often only after a good deal of time and cost has already been incurred in the proceedings. We address the reasons

[24] *See*, for example, *Dunnett v Railtrack plc* [2002] EWCA Civ 303; [2002] 1 W.L.R. 2434 and subsequent cases applying it.

[25] CAT Rules 2003 (SI 2003/1372), available at: http://www.catribunal.org.uk/240/Rules-and-Guidance.html.

for this further in our response to Question 30 in explaining why we believe there are very good reasons for providing additional incentives to offer a scheme of redress.

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

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

(a) Where the form of ADR is similar to mediation, which depends on the parties reaching a voluntary agreement, rather than having a solution imposed upon them by a third party, there is little point in compelling the involvement of the parties because it is unlikely to result in any resolution of the dispute. Parties who cannot even reach agreement on the use of an ADR procedure are unlikely to be able agree on settlement terms. Compelling parties to undertake ADR before they are willing to do so voluntarily may even obstruct settlement by making one or both parties less willing to try it again later at a more appropriate time.

(b) Parties should be free to insist on their right of access to the courts. It is a fundamental right of parties, protected *inter alia* by Article 6 of the European Convention of Human Rights ("**ECHR**"), to have a "*fair hearing*" before "*an independent and impartial tribunal*." ADR would not ordinarily satisfy those criteria as it is about compromise rather than vindication of rights; and

(c) It has so far generally been the policy of the Government and the courts not to make ADR mandatory. In fact, we note that para. 3.9 of the Pre-Action Protocol for Defamation Claims goes as far as to say that: "*It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR*." Similar statements are made in other pre-action protocols. We see little justification for singling out competition private actions as an exception in that regard.

2.92 Moreover, we would oppose any attempt to mandate ADR pre-action in the specific circumstances of competition private actions for the same reasons that we would oppose a pre-action protocol, as discussed below in relation to Question 25.

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

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?

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

2.95 The interaction of Articles 2, 5(3) and 6(1) of the Brussels Regulation create a situation where there are typically many different national courts that could entirely properly have

jurisdiction to determine the loss (if any) suffered by any given purchaser of allegedly cartelised goods. There is, accordingly, a choice of courts available.

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

2.97 If the purchaser must give the alleged cartelist prior notice of a claim, the alleged cartelist has the opportunity to pre-empt the claim by issuing its own proceedings in a court of its choice for a declaration that it has no liability toward the claimant. This is what has become known as the "Italian torpedo" and is what happened in the so-called synthetic rubber cartel case[26], where we believe that ENI acted precisely because it received a letter before action from a purchaser.

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

2.99 This issue will be particularly acute with large-scale cross-border damages actions, such as those that are likely to be brought by way of the new opt-out collective action, but it may still arise even in relation to cases that may be amenable to the proposed fast-track

[26] Case COMP/F/38.638 – Butadiene Rubber and Emulsion Styrene Butadiene Rubber, available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/38638/38638_826_1.pdf.

route. Indeed, the defendants' desire to avoid the fast-track may make it particularly likely for an Italian torpedo to be used as a tactical weapon.

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

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

2.102 With that in mind, we would propose a slightly different form of pre-action protocol that, strictly speaking, could be considered a "post-issue protocol". This would strongly encourage all parties to go through the protocol process, at the latest before the time for preparation of defences, with encouragement to agree stays of the proceedings for that purpose insofar as it may be necessary. We note that this is similar to the approach in existing pre-action protocols, where parties issue proceedings before complying with the protocol due to the imminent expiry of a limitation period. As with more typical pre-action protocols, there could be cost sanctions for refusal to comply.

2.103 It may be that there is no real need for a pre-action or even post-issue protocol because the approach just described is what tends to happen in practice anyway. Claimants and defendants tend to engage in discussions directed towards settlement and/or narrowing the issues in dispute either immediately following the issue of proceedings and even before service or, alternatively, following the determination of jurisdictional challenges.

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

2.104 Yes, the CAT rules governing formal settlement offers need amending.

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

(a) The rule only sets out a process for formal offers by defendants and not by claimants;

(b) The rule requires a cash payment to be made into court by the defendant. The equivalent High Court rule long ago removed the requirement actually to make a payment in order for a formal offer to be valid;

(c) There is no explanation of exactly how a payment into court is to be made. It is said that the details are to be found in a practice direction, but there appears to be no such practice direction;

(d) The defendant cannot withdraw or reduce the offer once made other than with the permission of the Registrar, the criteria for which grant of permission are not set out anywhere;

(e) Rule 43(5) permits the claimant to accept the offer at any point up to 14 days before the final hearing and rule 43(6) establishes a default rule that the claimant will be entitled to its costs up to the date of acceptance. This is an especially significant deterrent to the making of formal offers by defendants under rule 43 because it requires a defendant to give an open offer to pay all the claimants costs up to the point 14 days before trial, even if the claimant should have accepted the

offer immediately at a very early stage in the litigation. Conversely, it gives claimants no incentive to accept an offer prior to the point 14 days before trial;

(f) There is very little benefit to a defendant making an offer under rule 43 because the consequences of the claimant failing to beat the offer are only that it will be required to pay the defendant's costs from the last date on which it was permitted to accept the offer, which would be 14 days before trial. Further, while the Tribunal "may" order those costs to be paid on an indemnity basis and/or subject to penal interest, it is under no obligation to do so; and

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

2.106 Nevertheless, rule 43 gives little incentive to either claimants or defendants to make offers to settle.

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

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

acknowledge that the claimant was entitled to pursue that defendant for the whole of the loss caused by the cartel.

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

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

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

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

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

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

should be borne only by the defendants who failed to make offers or whose offers were beaten.

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

(a) Percentage overcharge suffered;

(b) Proportion of overcharge passed through;

(c) Volume of purchases affected; and

(d) Pre-judgment interest rate to be applied.

2.116 Such an approach would give individual defendants the opportunity to secure some degree of costs protection without in any way undermining the principle of joint and several liability, nor shifting the risk on allocation of losses between defendants to the claimant(s). It would also increase incentives to settle by prompting individual defendants to make more generous offers in order to avoid being left with a disproportionate share of the claimant(s)'s costs and, in turn, by probably leaving the claimant(s) facing higher offers from all defendants.

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.

2.117 The establishment of initiatives to facilitate the provision of ADR for disputes relating to competition law is unlikely to be a role appropriate for the Competition Law Association, but we would certainly be supportive of any such initiative.

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?

2.118 As explained above, we consider that there are insufficient grounds for introducing an opt-out system. However, should the Government choose to introduce an opt-out system, we do not have any strong opinions on this issue. The Consultation paper may be correct in its view that it would be possible to generate a collective action to be settled in all or most cases where there was a desire to reach a collective settlement. It would also commonly be possible for the parties to resort to the Dutch courts to give effect to their settlement if they wished to reach a collective settlement.

2.119 The same issue arises in relation to any opt-out collective settlement, as in relation to any opt-out collective action: namely, its enforceability outside the UK.

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?

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

Voluntary redress schemes

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

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

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

(a) It would be a resource intensive exercise for the relevant competition authority requiring it to engage with the specifics of the particular case and diverting its resources away from other, higher priority activities, including enforcement;

(b) It is not necessarily a task that falls within the expertise of the competition authority. Competition authorities do not currently get involved in the

quantification of losses at all, whereas there are many other professionals who do it every day. While the competition authority's assessment could be expected to be impartial, the approach required could well run the risk of leading to erroneously high or low figures;

(c) If the competition authority is to get involved in the substance of redress proposals, there may be issues about what information it can use in assessing those proposals. The competition authority may well have access to information that could not or would not otherwise be available to claimants, defendants, and/or tribunals determining such issues (*e.g.*, leniency submissions or information relating to connected investigations); and

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

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

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

(a) Submission of claims to an independently appointed panel of experts, perhaps consisting of one lawyer, one economist, and one accountant;

(b) Agreement by any participating cartelist to accept the panel's decisions as binding. Decisions would only become binding on purchasers if they chose to accept them;

(c) Power of the panel to determine its own procedure in any particular case, including the evidence to be received (albeit with an expectation that evidence will be kept to a reasonable minimum);

(d) Power of consumer/representative organisations to be involved and make submissions;

(e) Flexibility on defendants to offer non-monetary redress;

(f) Supervision/administration of the process by a renowned ADR provider such as the CEDR.;

(g) Processing of claims by an independent claims handler; and

(h) Funding of the process by the cartelist(s).

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

2.127 It is envisaged that "certification" by the competition authority would give rise to a modest reduction in fines (see response to Question 30) and costs consequences akin to those under Part 36 of the CPR if purchasers chose not to accept the resulting offers but failed to beat them in subsequent litigation.

Imposition of redress schemes

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

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

2.130 A redress scheme imposed by a competition authority would not be voluntary in any sense. At the extreme, it could simply amount to a deprivation of property without

proper judicial controls (which would no doubt raise issues under, *inter alia*, Article 1 of Protocol 1 to the ECHR). At best, it would amount to a partial deprivation of rights of defence without any compelling justification. We note, in this regard, that arguments could be made for similar powers in relation to other losses that tend to affect many people to a modest extent: for example, product liability, public nuisance, and other "mass torts".

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

2.132 It has been suggested that the power to compel participation in a redress scheme might only be used where most of the participants in a cartel are willing to take part in a redress scheme and only one or two are not. While we can see some superficial merit in that situation, in that it is clearly preferable to have all participants involved, we would suggest that any refusenik will come under considerable public pressure to participate and it will also face a threat of legal action avoided by all the others. One would hope that,

over time, those factors would discourage refusals to participate. A reduction in fines would also help in that regard (see answer to next Question 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?

2.133 We believe that a binding commitment to participate in a certified voluntary redress scheme should result in a modest reduction in fines imposed.

2.134 A reduction in fines is justified for three reasons:

(a) The threat of litigation will not necessarily be enough to incentivise participation in a voluntary redress scheme. Participation in a voluntary redress scheme will entail (alleged) cartelists making various sacrifices which they might quite reasonably be unprepared to do without some clear financial benefit. For example:

(i) Companies with infringement appeals pending may legitimately be reluctant to discuss compensation while there remains a chance that they will not be held liable at all. The availability of a Masterfoods stay in formal damages litigation allows them to avoid doing so;

(ii) A company submitting to a voluntary redress scheme might be able to avoid opt-out collective action (if such a system were introduced) through a challenge to the jurisdiction of the court, a challenge to class certification, or otherwise. More broadly, the company would be sacrificing the ability to raise all manner of procedural objections to claims;

(iii) A company submitting to a voluntary redress scheme would be accepting a probably less rigorous testing of purchasers' claims;

(iv) If the model adopted were similar to that proposed by the Confederation of British Industry ("**CBI**"), which would not be binding on the cartelist but only binding on purchasers who accept the result of the process, a company submitting to the scheme would not be getting any certainty and might be wasting a large amount of costs for little gain; and

(v) The formal litigation process will tend to delay the payment of compensation. Even with mounting legal costs and interest, the delay may still be valuable to companies.

The alleged cartelist would also be exposing itself to the costs of participation in the redress scheme (including the funding of the process if a solution such as the CBI's were adopted);

(b) There is likely to be a considerable benefit for claimants above and beyond anything they may achieve in litigation. In particular, compensation is likely to be available much more quickly and easily; and

(c) There is a benefit in terms of deterrence. The Consultation paper and impact assessment recognise that greater and quicker compensation will add to deterrence. If the redress scheme speeds up the process of compensation and avoids procedural obstacles to it, there is likely to be a public deterrence benefit.

Such a benefit or, conversely, the reduced need for the penalty to provide deterrence is something that ought properly to be recognised in setting fines.

2.135 A modest reduction of, say, 10% of the fine would not be out of line with the approach that the OFT has taken from time to time in relation to, for example, compliance policies. It would also be easy to administer.

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

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

2.137 It is generally accepted that antitrust enforcement involves three distinct tasks: (a) clarifying and developing the content of the prohibitions against anti-competitive agreements and conduct; (b) preventing the infringement of the prohibitions through punishment and deterrence; and (c) compensating the victims of infringements.[27]

2.138 As regards the first task, clarification of Articles 101 and 102 of the Treaty on the Functioning of the European Union and their UK equivalents have mostly been carried

[27] *See*, *e.g.*, W.P.J Willis, "The Relationship between Public Antitrust Enforcement and Private Actions for Damages" (March 2009), 32 *World Competition*, pp. 3-26.

out by public agencies and the courts (on appeal of public agency decisions)[28] and private actions for damages, certainly as far as concerns cartels, have not played any meaningful role in this regard. While stand-alone actions might in principle be used to clarify and develop the content of antitrust infringements, such actions are virtually non-existent (at least outside dominance cases). Follow-on actions, on the other hand, are unlikely to add much to clarification and development of antitrust rules provided by public agencies.

2.139 In contrast, private actions for damages could, in theory, contribute to deterrence, with companies taking into account the costs of damages potentially recoverable by third parties that have suffered loss when they decide whether to observe antitrust rules. In reality, as noted by Advocate General in *Pfledeirer* (relating to a German cartel case):[29] "*the role of the Commission and national competition authorities is, in my view, of far greater importance than private actions for damages in ensuring compliance with Articles 101 and 102 TFEU. Indeed so reduced is the current role of private actions for damages in that regard that I would hesitate in overly using the term 'private enforcement'*" (para. 40). Given the absence of many successful stand-alone actions in the UK, it follows that the role of private enforcement in deterring antitrust infringements currently depends chiefly on follow-on actions. The additional costs of the damages should, in fact, be taken into account by potential infringers when evaluating benefits of participating in a cartel, but the potential infringer is also aware that such additional costs

[28] *See* "Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases", available at: http://europa.eu/legislation_summaries/competition/firms/l26112_en.htm.

[29] C-360/09, *Pfleiderer AG v Bundeskartellamt*.

need only be paid where the cartel is first detected by, or revealed to, the antitrust authority.

2.140 Partly in light of these circumstances, it has been convincingly argued that public enforcement is superior for achieving optimal deterrence. The antitrust authority can increase the level of fines until the level is deemed sufficient to discourage potential infringers.[30]

2.141 Moreover, both the European Commission[31] and Court of Justice[32] appear to consider that the deterrent function of private actions is modest. In reality, the lack of stand-alone actions demonstrates that private enforcement does not play any meaningful role in the deterrence of competition law infringements.

2.142 Based on the above considerations, it seems that the only task pursued by private enforcement in the current system is that of generating compensation of the victims for the loss suffered as a consequence of antitrust violations. Under the current legislative framework, private enforcement does not complement public enforcement. Rather,

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[30] *See*, K.G. Elzinga and W. Breit, *The Antitrust Penalties: A Study in Law and Economics*, 1976, p. 95.

[31] In its White Paper on damages actions for breach of the EC antitrust rules, the European Commission stated that action for damages may "*produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules*" (n°1.2). Significantly, there is nevertheless less emphasis in the White Paper on the deterrence effect of private actions as compared with the earlier Green Paper – Damages actions for breach of the EC antitrust rules, where the Commission stated that "*Damages actions for infringement of antitrust law serves […] to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behaviour, thus contributing significantly to the maintenance of effective competition in the Community (deterrence).*" This shift in emphasis was no doubt a result of the public consultation on the Green Paper.

[32] In C-453/99, Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others, the Court of Justice stated that "*Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community*" (para. 27).

public and private enforcement have different roles and protect different interests. Public enforcement is aimed at preventing antitrust infringements, whereas private enforcement has the task of compensating the victims.

2.143 A second important observation is that private enforcement can not – and should not in our view – be instrumental in public enforcement achieving its main task (deterrence), but the opposite is not the case. Indeed, it is widely acknowledged that public enforcement is indispensable for enabling victims of antitrust infringements to become aware of antitrust infringements and/or to demonstrate violations of the competition rules. In this regard, every measure that has a positive effect on public enforcement will automatically benefit private enforcement. It is, therefore, desirable that the Government seeks to ensure a world-class public enforcement regime in the UK, allocating sufficient resources and adequately regulating the activity of the new Competition and Markets Authority.

2.144 In conclusion, we believe that the best approach is to regulate public and private enforcement in a way that they do not negatively interfere with each other, taking into account that, under the current legislative frameworks, the interests protected (deterrence and compensation) deserve and require the same amount of protection. This goal should be pursued by avoiding imposition of special rules that either restrict or widen the right of the victims of antitrust infringements to be compensated.

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?

2.145 The European Commission and national competition authorities insist that disclosure of leniency documents could compromise the effectiveness of leniency programmes.

However, competition authorities have not supplied much evidence to demonstrate the harmful effect of disclosure. In that regard, it has been recently noted that: "*despite the growing importance of leniency programs, the actual operation of these programs is somewhat opaque. […] Outside the enforcement agencies themselves, however, not much is known about the dynamics and timing of the race* [to expose the cartel in exchange of leniency]"[33].

2.146 While hard evidence of the impact of disclosure on leniency applications has not been presented, on 23 May 2012, the European Competition Network ("**ECN**") issued a resolution entitled "Protection of leniency material in the context of civil damages actions"[34], in which it was stated that: "*The experience of the [competition authorities] shows that when deciding whether or not to cooperate with [competition authorities] under a leniency programme, potential leniency applicants consider as an important factor the impact of such cooperation on their position in civil proceedings as compared with the situation where they decide not to cooperate with [competition authorities]*". This statement does suggest evidence of the negative impact of disclosure of leniency documents. However, the debate would no doubt be helped if competition authorities presented more evidence with a view finding the right balance between the protection of the effectiveness of leniency programmes and the possibility for victims to recover damages suffered from antitrust infringements. This would also assist national courts

[33] C.R. Leslie, "Editorial – Antitrust Leniency Programmes", *The Competition Law Review* 7, p. 176.

[34] "Protection of leniency material in the context of civil damages actions" available at: http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf.

when conducting the weighing exercise required by the European Court of Justice in *Pfleiderer*.[35]

2.147 The debate about disclosure of leniency documents may be considered from two different angles: (a) the incentive to submit a leniency application in the first place; and (b) the incentive to supply competition authorities with all possible details/documents concerning the antitrust infringement.

2.148 There are several arguments supporting the view that disclosure of leniency documents does not have any significant effect on the incentive of submitting leniency application.

2.149 The first argument is that legislative framework is such that there has never been absolute protection of all leniency documents. As a result, it has been always uncertain as to the extent to which such documents would be given protection. The latest decision of the General Court in relation to the so-called Transparency Directive (Regulation No. 1049/2001), which was enacted more than 10 years ago, is interesting in this regard. In *EnBW,*[36] the General Court held:

> "*The third indent of Article 4(2) of Regulation No 1049/2001 therefore applies, in the Commission's submission, after particular proceedings have been completed. Given that, in proceedings against cartels, the Commission is reliant on the cooperation of the undertakings concerned, it submits that, if the documents that those undertakings provides it with were not kept confidential, the undertakings*

[35] C-360/09, *Pfleiderer AG v. Commission*, 14 June 2011.

[36] T-344/08, *EnBW Energie Baden-Württemberg AG v. Commission*, 22 May 2012.

would have less incentive to file leniency applications and would also restrict themselves to the bare minimum when providing all other information, in particular as regards requests for information and inspections. The protection of confidentiality is thus a prerequisite for the effective prosecution of infringements of competition law and, by the same token, an essential component of the Commission's competition policy. However, acceptance of the interpretation proposed by the Commission would amount to permitting the latter to exclude its entire activity in the area of competition from the application of Regulation No 1049/2001, without any limit in time, merely by reference to a possible future adverse impact on its leniency programme. Account should be taken, in that regard, of the fact that the consequences which the Commission fears for its leniency programme depend on a number of uncertain factors, including, in particular, the use that the parties prejudiced by a cartel will make of the documents obtained, the success of any actions which they may bring for damages, the amounts which will be awarded them by the national courts and the way in which undertakings participating in cartels will react in future. Such a broad interpretation of the concept of 'investigation' is incompatible with the principle that, on account of the purpose of Regulation No 1049/2001, as stated in recital 4, namely, 'to give the fullest possible effect to the right of public access to documents', the exceptions laid down in Article 4 of that regulation must be interpreted and applied strictly (see the case-law cited in paragraph 41 above). It must be stressed, in that regard, that nothing in Regulation No 1049/2001 gives grounds for assuming that EU competition policy should enjoy, in the application

of that regulation, treatment different from other EU policies. There is thus no reason to interpret the concept of the 'purpose of investigations' differently in the context of competition policy than in other EU policies".

This shows that the European Commission cannot apply a blanket ban on access to leniency documents by reference to general concerns regarding the impact disclosure would have on its leniency regime.

2.150 Other recent and relevant judgments are those by the Court of Justice in *Pfleiderer*[37] and the English High Court in *National Grid*[38], which have equally confirmed that there is no absolute protection of leniency documents. Also, the US Courts have handed down several (conflicting) decisions on the discoverability of leniency documents submitted to the European Commission.

2.151 Accordingly, since adoption of the EU's leniency regime, a prudent advisor would have explained to any potential leniency applicant that the risk of disclosure of the leniency documents and their use in follow-on damages actions could not be excluded. Notwithstanding this, leniency applicants do not appear to have been discouraged from requesting access to leniency programmes.

2.152 A second argument that seems to suggest that disclosure of leniency documents may not have a substantial impact on the decision to submit a leniency application relates to leniency applications by employees. There is a danger that an employee may seek

[37] C-360/09, *Pfleiderer AG v. Commission*, 14 June 2011.

[38] *National Grid Electricity Transmission plc v ABB Ltd and others* [2012] EWHC 869 (Ch).

leniency in advance of his/her company and this can lead to "*a race for corporate leniency between the principals of the members of the cartel*."[39] Moreover, "*[t]he real value and measure of the individual leniency program is not in the number of individual applications we receive, but in the number of corporate applications it generates*."[40] The race between companies and their employees is unlikely to be influenced by possible future disclosure of leniency documents in future damages actions.

2.153 A third argument can be found in *National Grid*[41], where it is stated that:

> "*a decision not to go to the Commission would not have given ABB any guarantee of protection from civil liability since if any of the other participants had informed the Commission the cartel would have been exposed. Then ABB would similarly have been liable to civil claims but in addition would have faced a very substantial fine. Of course, any disincentive to seek leniency because of potential disclosure in civil litigation might have dissuaded all the other participants from approaching the Commission, but this would have been a high-risk gamble for ABB to take*" (para. 37).

The severe monetary fines imposed by competition authorities (not to mention other sanctions such as director disqualification and criminal liability) remain the principal driver towards submission of leniency applications.

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[39] *See* F. Thépot, "Leniency and Individual Liability: Opening the Black Box of the Cartel" (2011) *The Competition Law Review* 7 , p.237).

[40] *See* SD Hammond, "Cornerstones of an Effective Leniency Program", presented before the ICN Workshop on Leniency Programs, Sydney, Australia November 22-23, 2004 and available at: http://www.justice.gov/atr/public/speeches/206611.htm.

[41] *National Grid Electricity Transmission plc v ABB Ltd and others* [2012] EWHC 869 (Ch).

2.154 While potential future disclosure of leniency documents may not necessarily have a significant impact on the decision to submit a leniency application in the first place, it seems more likely that disclosure of leniency documents may have an impact on the extent of information and evidence disclosed to the antitrust authority. This is implicitly confirmed by the following statement by Mr. Alexander Italianer:

> "*Immunity leniency programmes are of course only useful to the extent that the cooperation provided by applicants actually contributes to proving the violation. It is natural for applicants – and this is a trend we have detected – that applicants want to provide enough to qualify, but also to limit their exposure as much as possible, if only to minimise follow-on damages claims*".[42]

2.155 A regulation preventing the victims of antitrust infringement from accessing all leniency documents (and possibly other documents, including the confidential version of the final decision) is likely to have a certain negative effect on private enforcement.[43] In contrast, there does not seem to be any strong evidence that disclosure would have any substantial

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[42] *See* "Trends in Cartel Enforcement and Policy", ICN Annual Conference 2010, Istanbul, Cartel Working Group Session, 29 April 2010, p. 3, available at: http://ec.europa.eu/competition/speeches/text/sp2010_02_en.pdf.

[43] Mr. Joaquìn Almunia recently declared that: "*We are committed to protecting our leniency policy following last year's Pfleiderer judgment. This is a matter of common concern for Europe's public enforcers. Just a few weeks ago, the heads of the agencies associated in the European Competition Network adopted a joint resolution on the protection of leniency material in the context of damage actions. But we are seeking a more general solution. I intend to propose legislation later this year that will strike the right balance between the protection of leniency programmes and the victims' rights to obtain compensation*" (Speech on *Antitrust enforcement: Challenges old and new*, 19th International Competition Law Forum, St. Gallen, 8 June 2012, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/428). This statement confirms what had been already announced in the Annex to the Commission Work Programme 2012, available at: http://ec.europa.eu/atwork/programmes/docs/cwp2012_annex_en.pdf: "*The objective of this legislative initiative would be to ensure effective damages actions before national courts for breaches of EU antitrust rules and to clarify the interrelation of such private actions with public enforcement by the Commission and the national competition authorities, notably as regards the protection of leniency programmes, in order to preserve the central role of public enforcement in the EU.*"(page 3, n. 7).

impact on the decision to submit leniency applications in the first place. Since, however, leniency applicants may limit what they say in corporate leniency statements if there is a risk of such statements being disclosed, it would appear sensible to us to introduce legislation protecting corporate leniency statements from disclosure (including where such statements are quoted in the authority's decision), although protection should not extend to pre-existing documents already in existence at the time of drawing up the corporate leniency statement.[44] This would help to ensure the effective enforcement of EU/UK antitrust rules, while at the same time not unnecessarily hampering the bringing of private damages actions. Indeed, providing access to leniency documents may reduce litigation costs associated with complex economic analysis relating to causation and quantum, as well as reducing error costs, especially when the public version of the decision dos not contain all elements necessary to establish causation and quantum.[45]

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

2.156 In some jurisdictions, there are already exceptions to the rule that imposes joint and several liability over all members of the cartel.

[44] A rule protecting pre-existing documents could "*allow the applicant to use the leniency program in order to prevent the disclosure of these documents*". *See, e.g.*, the European Commission's Green Paper on private damages action, para. 233.

[45] *See* Final Report for the European Commission, "Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios", 21 December 2007, pp. 500-501. Disclosure of leniency documents may reduce the strategic use of leniency applications against competitors. *See*, D. Sokol, "Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement" (2012) 78 *Antitrust Law Journal*, p. 212: "*Nearly all practitioners stated that the strategic use of leniency (strategic in the sense that the leniency program may be used to punish rivals and in some cases even to help enforce collusion) is a reality and the only issue was the frequency and severity of the strategic gaming. Over half of the interviewers found that strategic leniency was significant.*"

2.157 The most notable exception is the US where the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 provides that, in civil actions alleging violations of the Sherman Act – such as price fixing – Department of Justice leniency applicants are only liable for actual damages caused by their conduct, as opposed to treble damages and joint and several liability, if the leniency applicants provide "*satisfactory cooperation*" to the plaintiffs.[46] Other members of the cartel remain jointly and severally liable, but it is noteworthy that the US antitrust law contains a "no-contribution rule" intended to promote settlements between cartel members and victims.[47]

2.158 Legislation has also been recently introduced in Hungary which means that successful immunity applicants are not jointly and severally liable provided the claimants can obtain full redress from the other cartel participants. The relevant provisions read as follows:

> "*Any person to which immunity from fine was granted under Article 78/A may refuse to pay damages for the harm caused by his conduct infringing Article 11 of this Act or Article 81 of the EC Treaty until the claim can be recovered from any other person responsible for causing harm by the same infringement. This rule is without prejudice to the possibility of bringing a joint action against persons causing the harm. Lawsuits initiated to enforce claims against persons*

[46] Note what is said in the "Report to Congressional Committees of the United States Government Accountability Office Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection", July 2011, available at http://www.gao.gov/assets/330/321794.pdf: "*Our interviews with defense attorneys representing 18 leniency applicants who came forward to the Antitrust Division both before and after ACPERA indicate ACPERA's offer of relief from civil damages had a slight positive effect on leniency applicants' decisions to apply for leniency, though the threat of jail time and corporate fines were the most motivating factors both before and after ACPERA's enactment.*"

[47] *See* Easterbrook, Landes & Poster, "Contribution Among Antitrust Defendants: a Legal and Economic Analysis" (1980) 23 *Journal of Law and Economics* 331, p.365: "*A rule of no contribution creates competition among defendants to settle rather than litigate. Each defendant dreads being the last to settle, because every time one defendant settles the expected liability of the remaining increases.*"

responsible for harm to which immunity from fine was granted shall be stayed until the date on which the judgment made in the administrative lawsuit initiated upon request for a review of the decision of the Hungarian Competition Authority establishing an infringement becomes legally binding".[48]

2.159 Reform has also been discussed at European level, with the European Commission proposing removal of joint and several liability in its Green Paper,[49] although this was strongly opposed by the European Parliament.[50]

2.160 Other proposals discussed by the OFT have included removal of joint and several liability of the immunity applicant, provided the other cartelists are solvent or giving courts the power to allow the immunity applicant to seek contributions of up to 100% from non-leniency recipients.[51]

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[48] *See* C. I. Nagy, "The New Hungarian Rules on Damages Caused by Horizontal Hardcore Cartels: Presumed Price Increase and Limited Protection for Whistleblowers – An Analytical Introduction", (2011) 32 *European Competition Law Review* 2, p. 66.

[49] *See* European Commission staff working paper accompanying the Green Paper available at: http://ec.europa.eu/competition/antitrust/actionsdamages/sp_en.pdf: "*Damages claims are tort claims and under general rules of civil liability undertakings which are parties to anti-competitive agreements will be liable for the whole of the damage caused by these agreements. The tortfeasors will be jointly and severally liable for the damage caused by their actions. A possible policy solution would be to limit the liability of the leniency applicant to the share of the damage corresponding to his share in the cartelized market*" (para. 236).

[50] For a detailed discussion of the debate at the European Level about the proposal to remove joint and several liability, *see* C. Cauffman, "The Interaction of Leniency Programmes and Actions for Damages", in 7 *The Competition Law Review* 2, pp. 210-213.

[51] OFT, "Private actions in competition law: effective redress for consumers and business, Discussion Paper", April 2007, available at: http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916.pdf. ("*The first is the complete removal of joint and several liability for the immunity recipient. We consider that, in order to strike a proper balance between the public and private interests involved, it may be appropriate only for the immunity recipient to benefit from the removal of joint and several liability. The position of other leniency recipients would be unaffected. The second would be to allow claimants to bring an action against an immunity recipient under normal principles of joint and several liability, whilst empowering the court to allow the immunity recipient, in turn, to seek contributions of up to 100 per cent from non-leniency recipients.*" (para. 7.18).

2.161 The main criticism levelled at the proposal to remove joint and several liability of the immunity applicant is the risk that victims of cartels may be unable to obtain full compensation if the other cartel members have become insolvent (at least in those cases where the victims have not purchased the majority of the cartelised products from the immunity applicant). However, it seems that this scenario is rather remote, especially where removal of joint and several liability is limited to the first immunity applicant. By contrast, a rule removing joint and several liability from the immunity applicant could provide an incentive to submit leniency applications, not least given that the potential immunity applicant may be in a better position to assess the total anticipated costs associated with such an application (*i.e.*, civil damages would be limited to the harm caused through the cartelised products and/or services sold by the applicant).

2.162 Removal of joint and several liability should not, however, be extended to other leniency applicants. First, giving only the immunity applicant this benefit would increase the difference with other members of the conspiracy and, in turn, render the cartel more unstable and liable to detection. Second, extending this benefit to all leniency applicants could substantially increase the possibility that victims will not be compensated given that those cartel participants deciding not to cooperate may become insolvent.

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.

2.163 All rules aimed at facilitating private damages actions and ability of victims to obtain redress (*i.e.*, presumption of loss, denial of passing-on defence) have the potential negatively to impact on public enforcement.

2.164 As submitted above, it does not seem advisable to prevent victims from being able to recover damages through introducing a special rule imposing an absolute ban on access to leniency documents. Equally, however, it does not seem justifiable to place victims of antitrust infringements in a better position than victims of other types of torts.

2.165 Every rule that renders antitrust damages actions easier as compared with other tort actions will likely discourage potential leniency applicants, whereas it is doubtful whether consumers have serious concerns based on the current absence of successful damages actions.[52] As has been noted:

> "*[t]he losses from antitrust violations are widely dispersed, do not represent the disappointment of strongly held expectations, and can in many cases be adapted to without severe dislocation in the lives of the persons affected. Moreover, existing welfare laws, unemployment compensation, bankruptcy laws, and a number of provisions in the tax laws provide relief from any catastrophic losses, including those that might result from an antitrust violation*".[53]

2.166 Accordingly, the best way to protect the efficacy of the public enforcement regime is to avoid any measures that artificially increase the number of private actions for damages and risk deterring submission of leniency applications.

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[52] A convincing explanation is provided by W.P.J. Willis, "Should Private Antitrust Enforcement Be Encouraged in Europe?" (September 2003) 26 *World Competition* 3, pp. 473-488.

[53] W.F. Schwarz, *Private Enforcement of the Antitrust Laws: An Economic Critique* (American Enterprise Institute 1981) at p. 32.

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The CLA would be happy to arrange a meeting with BIS to discuss in more detail any of our comments provided above.

United Utilities Water

Department for Business Innovation and Skills
Private Actions in Competition Law: A consultation on options

23 July 2012

United Utilities Water PLC Response

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

   We support an amend ment to Se ction 16 of t he Enterprise Act. Our understanding is that th e CAT would be b etter equipp ed to deal with competition law ca ses as ther e would be a specialist panel which could draw on their experience and expertise.

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

   The consu ltation paper recognises t hat a significant number of SMEs who currently believe they are the victims of anti-competitive behaviour actually have no strong competition case to bring (paragraph 4.29). The system is the refore at risk of at tracting unmeritorious ca ses. Therefore we suggest that if this amendment is allowed there should be a process for selecting appropriate cases to answer.

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

   We agree with this recommendation.

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

   We agree however as s tated in our response to question 2 there needs to be a process for selecting appropriate cases to answer to avoid vexatious litigants which can damage legitimate businesses.

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

   We believe that punitive and future loss of earnings should not be included. We suggest that only actual loss of earnings should be taken into account. There should be a time limit in relation to when a claim can be made. We suggest a claim should be brought within 6 years of the alleged incident occurring which would align with the current time limit in civil proceedings.

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

   We do not feel that anything else needs to be done in respect of enabling SMEs to bring competition cases to court.

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

   We do not have any comments in relation to this matter.

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 have any comments in relation to this matter.

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

   We do not think there is a need to extend collective actions but if the Government chooses to do this we strongly support the protections outlined in Annex A especially the preliminary merits test and contingency fees to continue to be prohibited.

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 have any comments in relation to this matter.

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

    We believe that the current system is working well. (Please see response to question 9 above).

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

    We agree that restrictions should apply and in particular to stand-alone cases due to the nature and complexity of such cases. In addition we suggest that these matters should be dealt with by the Competition Authority.

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

    We do not have any objections to this proposal.

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

    We believe that it would depend if the parties wanted to be part of the collective action and whether if they chose to opt-out they would be content that an outcome of a collective action might constitute a precedent were a separate claim to be brought against the party.

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

    We support a thorough preliminary process of certification and agree with the proposed list.

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

    We agree. Please see response to question 5 above.

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

We agree that the loser-pays rule is to be maintained. We believe that to take this out would be unjust for the successful party and could damage businesses. In addition it provides a safeguard in relation to frivolous claims.

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

We do not think there are any circumstances that it should be departed from. There should be a mechanism for the successful party to recover costs.

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

We agree. Please see response to question 5 above.

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

We believe that large unclaimed sums are not good for the system. In addition what would happen to the unclaimed sums? Is there a certain period of time that people have to claim the sums and what happens after that period has expired? Any unclaimed sums within the opt-in system should be able to be dealt with adequately by identifying people who have suffered damage.

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 note that the paper does not explain how the money would be used once in the foundation. Therefore we suggest that this point needs to be clarified.

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

We disagree and consider that it should be the competition authority only, to prevent abuse by consultants and legal firms that do not have an interest.

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

We disagree with allowing private bodies to bring opt-out collective actions. See response 22 above.

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

We agree that it should not be mandatory as it may not be suitable for all cases. In addition we

suggest that parties' willingness to enter into ADR should be taken into account when considering settlements and costs in the case.

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

We agree with this proposal as it would assist in avoiding unmeritorious cases. A pre-action protocol would be beneficial for all cases in the CAT.

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

We agree as it would bring it in line with the latest developments in legal proceedings.

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

We support the provision of ADR. There is already a well established framework for ADR in civil proceedings and we therefore suggest considering that system.

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 not have any comments in relation to this matter.

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 as long as the redress is proportionate and is taken into consideration when determining any financial penalty.

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

We agree. Please see response to question 29 above.

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

We believe that conflicts in setting precedents in private and public cases need to be considered carefully and how this would work.

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 suggest that commercially sensitive and legally privileged documentation should be protected.

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

We do not have any comments in relation to this matter.

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 have any comments in relation to this matter.

US Chamber Institute for Legal Reform

Response of the U.S. Chamber Institute for Legal Reform to the Consultation on Private Actions in Competition Law

EXECUTIVE SUMMARY

The U.S. Chamber Institute for Legal Reform ("ILR"), a nonprofit advocacy organization recognized the world over for its efforts to limit litigation abuse and ensure a simple, efficient and fair legal system, is pleased to enclose its response ("Response") to the Department for Business Innovation and Skills' consultation entitled, *Private Actions in Competition Law: A Consultation on Options for Reform* ("Consultation").

While commending the Government for the obvious thought and efforts put into the Consultation, ILR nevertheless generally opposes any measures intended to expand the use of private collective actions in the competition field. In the Response, ILR answers the Consultation questions while stressing these critical points:

- First, ILR challenges the Consultation's assumption that private redress in the field of competition law is lacking in the UK.

- Second, even assuming that private redress is lacking, ILR believes that implementing private *collective* redress would lead inexorably to lawsuit abuse, as collective cases are inherently prone to such abuse.

- Third, ILR believes that any collective redress regime that relies on *private* actions necessarily will supplant, rather than enhance, public enforcement of competition law by competition authorities.

- Finally, notwithstanding all of these risks, should the Government implement a private collective redress regime in the field of competition law, ILR believes it should include stringent safeguards against lawsuit abuse.

1. Private Collective Redress Is Not Necessary.

As an initial matter, ILR's Response challenges the Government's assertion that the private collective redress regime proposed in the Consultation is necessary to right alleged competition law infringements. The information on current practices in the Consultation shows that existing methods for collective redress are not often used, but it does *not* show any large-scale demand for a new regime of private collective redress, or that such a regime, if implemented, would cure the supposed defects the

Consultation finds in the existing system. For this reason, ILR urges the Government to consider whether existing enforcement mechanisms require strengthening, and, if so, to further consider less drastic means of doing so than implementing such an abuse-prone mechanism as private collective litigation.

2. Implementing Private Collective Redress Would Lead to Lawsuit Abuse.

ILR shows in its Response that adopting the proposals contained in the Consultation would lead to an increase in abusive litigation. Collective litigation is inherently more vulnerable to abuse than individual lawsuits, because it aggregates the claims of numerous litigants in a single proceeding, thus increasing both the overall amount in dispute and the cost of the dispute itself. As a result, a defendant in a collective action frequently faces both litigation exposure and costs far exceeding those faced in an individual lawsuit, which may compel defendants to settle collective actions rather than seek adjudication on the merits, regardless of the validity of the claims at issue. In these respects, collective actions are inherently coercive; because the mere act of filing a collective claim can threaten even an innocent defendant with ruinous economic harm, the availability of a mechanism to aggregate claims into a collective action can lead to increased lawsuit abuse.

3. Implementing Private Collective Redress Would Supplant Public Enforcement.

ILR further reveals in its Response that the structural result of implementing private collective actions would be the partial privatization of competition law enforcement in the UK. However, ILR believes, as explained in the Response, that competition law enforcement must remain the sole province of the competition authorities which have the expertise and judgment to enforce the competition laws dispassionately and in the best interests of all consumers and businesses. Because a competition authority has experience and expertise in this area, it is far better positioned than private individuals to ascertain whether and to what extent competition law infringements actually occur. A competition authority is also better positioned to make the policy judgments surrounding every enforcement decision than private claimants who have a direct, self-interested, financial stake in a matter. ILR suggests that if the Government is determined to facilitate redress, then it should study ways in which public enforcement could be enhanced so as to deliver redress in appropriate cases, rather than promote collective litigation.

4. If the Government Implements Private Collective Redress, It Should Include Safeguards against Lawsuit Abuse.

If, after the further consideration of any need to improve competition redress that ILR advocates in the Response, and if, notwithstanding the dangers of private collective

redress that ILR discusses in the Response, the Government is still determined to move forward with the proposals contained in the Consultation, ILR urges the Government to include safeguards against litigation abuse. In specific answers to the Consultation questions, the Response discusses the following safeguards:

- ***Due process.*** Competition proceedings must not be expedited in ways that reduce defendants' due process protections, including by implementing a presumption on the quantification of damages. Notwithstanding that ILR disagrees with the Government's policy of encouraging litigation in this field, there is no justification for seeking to achieve that aim by radically altering the burden of proof.

- ***Loser pays.*** The "loser-pays" rule, which already is in effect in group litigation in England and Wales, powerfully deters claimants from bringing unmeritorious claims and defendants from raising unmeritorious defenses. It should be preserved in competition cases.

- ***Stringent certification standards.*** Any proposal for private collective actions should include a certification requirement, whereby a court must determine that all of the claims of the proposed group members can be adjudicated fairly in a single proceeding and established through common proof, before the action may go forward.

- ***Treble and punitive damages.*** Because collective actions already pose the risk of abuse caused by outsized awards, treble and punitive damages should not be permitted.

- ***No contingency fees.*** Contingency fees in private collective actions encourage lawyers to commence lawsuits to extract the highest possible settlement and take a contingency fee, even though the resulting award to individual claimants is often negligible.

- ***No third-party funding of collective actions.*** Third-party litigation funding presents many of the same dangers as contingency fees without the ethical safeguards that govern the client-lawyer relationship. Such funding should not be permitted in collective actions.

- ***No* cy pres *awards.*** *Cy pres* awards depart from the objective of providing compensation to claimants who have suffered harm. Instead, such awards provide a windfall to entities that have not themselves suffered any harm. *Cy pres* awards should not be allowed.

ILR would be pleased to discuss its Response with the Government, or answer any questions about the Response that the Government may have.

Response of the U.S. Chamber Institute for Legal Reform to the Consultation on Private Actions in Competition Law

The U.S. Chamber Institute for Legal Reform ("ILR") is pleased to respond to the Department for Business Innovation and Skills' consultation entitled, *Private Actions in Competition Law: A Consultation on Options for Reform* (the "Consultation").

ILR is a not-for-profit public advocacy organization affiliated with the U.S. Chamber of Commerce, the world's largest business federation, which represents the interests of more than three million businesses of all sizes and sectors, as well as state and local chambers and industry associations. ILR's mission is to ensure a simple, efficient and fair legal system. Since ILR's founding in 1998, it has worked diligently to limit the incidence of litigation abuse in United States (U.S.) courts and has participated actively in legal reform efforts in the U.S. and abroad. Many of ILR's members have business interests in the United Kingdom (UK), and ILR is deeply committed to the orderly administration of justice in the UK.

For more than a decade, ILR has studied the effects of collective litigation and the ramifications of collective redress schemes for civil justice systems. ILR has published numerous articles on collective actions and has participated in public symposia about them. ILR has also engaged in substantial advocacy efforts in the U.S., the European Union, and in a number of countries around the world regarding legislation governing collective actions. ILR has been recognized as an expert and constructive partner in reform efforts relating to collective actions. A number of European governments have consulted or are consulting ILR when legislating in this area.

Introduction

ILR commends the Government for the obvious care and attention to policy detail put into the Consultation. ILR also commends the Government's stated goal of avoiding U.S.-style class actions in the UK. Indeed, we understand that the Government's purpose is to further protect consumers from infringements of competition law. We question, however, whether a need exists in the UK for private collective redress in the field of competition law. Moreover, if such a need does exist, we do not believe that the proposals set out in the Consultation would be the best approach. We believe that the proposals, if implemented, will have a number of unintended negative consequences for consumers and for the administration of civil justice in the UK. In addition, if the proposals were implemented, they would to some extent supplant public enforcement of competition law by competition authorities with private enforcement by self-interested claimants.

The Absence of Need for the Proposals and the Dangers of Collective Actions

As a threshold matter, ILR does not believe that the Consultation shows that a need exists in the UK for the introduction of new mechanisms for private collective actions relating to alleged

competition law infringements. The information on current practices in the Consultation shows that existing methods for collective redress are not often used, but the Government nonetheless bases its far-reaching proposals on an assumption of large-scale demand for new methods. In section 5 of the Consultation, for example, the Government discusses the *JJB Sports* collective action brought by Which?. The consultation notes that, despite efforts by Which? to encourage participation in that case, and despite what the Consultation calls "wide press coverage," only 130 claimants, or fewer than 0.1% of those eligible, signed up for compensation.[1] The Government does not appear to question whether everything possible was done to explain to consumers the advantages of participating in what – at the time – was an entirely novel procedure. Nor does the Government question the efficacy of its own role in communicating to consumers the opportunities available to obtain redress.

Instead, the Government attributes the low number of collective cases in general to just two factors: the time it takes for there to be an infringement decision which can form the basis of a follow-on action and an assumption that the requirement to communicate a choice to participate (i.e. by opting-in) is too burdensome for consumers.

As to the first issue, establishing whether a competition infringement has occurred is often complex, and the time required for due process should not be characterized as a systemic flaw. As to the second issue, ILR firmly believes that the decision to participate in litigation is a serious one, with potentially significant consequences. Opting-in to a case is a very simple matter for those that have made the informed choice to do so. ILR strongly disagrees that it is somehow fairer to adopt an opt-out regime which runs the risk that some claimants (who are not aware of the litigation or how to opt-out) will have the decision of whether or not to participate in a legal action made for them.

There are many possible reasons for the low uptake in the *JJB Sports* case, none of which are properly considered in the Consultation. It is possible that consumers did not participate in the *JJB Sports* case either because they did not know about it or because they did not feel they had a sufficient understanding of the consequences. If so, better information from the Government and/or Which? might have led to different results. Provided consumers make informed choices about whether or not to participate in a legal process, those choices should be respected, and it is not the Government's place to inflame consumer disputes into court-based litigation. The reasons for the limited uptake in *JJB Sports* require further consideration; it does not necessarily make the case for the mechanisms now proposed by the Government.

This is especially worrying because of the damaging unintended consequences that would almost certainly flow from adopting the proposals. As we explain in detail in responding to questions 13 and 14 below, collective litigation is inherently more vulnerable to abuse than individual lawsuits, because it aggregates the claims of numerous litigants in a single proceeding. When numerous claims are aggregated in this way, the overall amount in dispute increases – as does the cost of the dispute itself. As a result, a defendant in a collective action frequently faces both litigation exposure and costs far exceeding those faced in an individual lawsuit. This may compel defendants to settle collective actions rather than seek adjudication on the merits, regardless of the validity of the claims at issue. Indeed, many defendants often agree to settle collective actions on sub-optimal terms rather than take their chances at trial. This is true even when the defendant has meritorious

[1] Consultation ¶ 5.4-5.5.

defenses, or when the claims of the class members lack validity. At the same time, because collective actions aggregate numerous individual claims – without individualized proof – they include weak or non-meritorious individual claims along with any valid claims, without any effective mechanism to litigate them individually.

In these respects, collective actions are inherently coercive; because the mere act of filing a collective claim can threaten a defendant – even (in the case of stand-alone actions) an innocent defendant – with ruinous economic harm, the availability of a mechanism to aggregate claims into a collective action can lead to an alarming uptick in nonmeritorious litigation.

Moreover, the argument that collective actions increase what proponents call "access to justice" is at bottom merely an acknowledgement that such actions increase the ability of claimants to sue defendants in court. No one could dispute that increasing claimant access to the courts also increases the likelihood that any potential defendant will be haled into court on a frivolous claim – especially if stand-alone collective actions are not prohibited. Increasing court access necessarily increases the risk of meritless litigation, and the attendant harm to business, the economy, and, ultimately, to consumers themselves.

For these reasons, and based on ILR's years of study of collective actions, we do not believe that such aggregate litigation should be introduced as a means of enforcing competition law in the UK. Instead, the Government should consider further whether a need actually exists in the UK to enhance redress in competition cases. Only then, if the Government determines that such a need does exist, should it consider other, less dangerous options for satisfying that need. As noted above, collective actions of the kind proposed by the Government are inherently open to abuse, but other, less risky means for providing collective redress exist. For example, voluntary alternative dispute resolution ("ADR") schemes may provide a suitable alternative to collective actions. The European Commission's Directorate General for Health and Consumers has recently proposed legislation aimed at ensuring access to such schemes and, in our view, the principle that ADR mechanisms should be available, and should be considered (though not imposed) before court proceedings are commenced, applies as much to aggregate litigation as any other form of litigation. ADR is just one possibility for addressing any under-compensation of victims of competition law infringements. We urge the Government to consider such possibilities before launching a dangerous and potentially damaging regime featuring extended collective actions.

Private vs. Public Enforcement

Aside from the danger of lawsuit abuse created by the extended collective action regime envisioned in the Consultation, the structural result of such a regime would be the partial privatization of competition enforcement in the UK. As the Consultation states, the Government "*believes that, in certain limited circumstances, private actions can complement public enforcement, enhancing the benefits of the competition regime in our economy.*"[2] ILR respectfully disagrees with this assertion and submits that competition enforcement must remain the sole province of the competition authorities, which have the expertise and judgment to enforce the competition laws dispassionately and in the best interests of all consumers. In doing so, a competition authority must – and does – consider what is in the public interest.

[2] Consultation ¶ 3.5.

Accordingly, public enforcement by a competition authority is superior to private enforcement through collective litigation. Because a competition authority has experience and expertise in this area, it is far better positioned than private individuals to ascertain whether and to what extent competition law infringements actually occur. A competition authority is also better positioned to make the policy judgments that surround every enforcement decision than private claimants who have a direct financial stake in a matter.

Unlike a competition authority, private parties are predominantly interested in commencing litigation for the prospect of financial reward. Accordingly, while individuals must be able to enforce their legal rights, their choosing to do so should not be considered a supplementary form of law enforcement, which necessarily involves policy judgments by the authority bringing the enforcement action.

For these reasons, to the extent the Government believes that public competition enforcement is lacking, ILR suggests studying ways to improve, rather than supplanting it with private collective enforcement. One way in which the Government could enhance public enforcement (if necessary) would be to consider legislation to empower the OFT to skim ill-gotten gains from proven infringers and return those illicit profits to consumers, or to distribute penalties paid by proven infringers to consumers. Indeed, ILR believes that public enforcement can be an effective means to provide compensation to victims of unlawful activity. In the U.S., for example, the "Fair Funds" mechanism of the Securities and Exchange Commission (the "SEC") demonstrates one possible approach to meeting the dual goals of public enforcement and private compensation. Each year, the SEC collects substantial civil penalties and disgorgement amounts[3] from securities law violators. In 2010 and 2011, the SEC ordered recoveries of $2.8 billion per year.[4] Since 2002, the SEC has been able to place these recoveries into Fair Funds, which it can choose to distribute to investors harmed by the punished conduct.[5] The SEC administers and distributes these funds pursuant to plans that must be approved either by a court or by the SEC after a period for public comment. The amount of money that the SEC has transferred to date has been significant, between 2002 and 2010, 128 Fair Funds were created, and $6.9 billion was returned to investors.[6]

The Fair Funds mechanism has clear advantages over the U.S. private securities litigation system. The SEC, as a government agency staffed by experts and charged with a public purpose, can ensure that funds are distributed only when recovery is justified on the merits, rather than for the more self-interested reasons that can motivate private litigants and their lawyers. In addition, lawyers' fees and other costs do not reduce the amount available for Fair Fund distributions.[7]

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3 The SEC's power to require companies to disgorge ill-gotten gains is analogous to the skimming authority in European countries.

4 *See* Government Accountability Office ("GAO"), SEC's Financial Statements for Fiscal Years 2011 and 2010, GAO-12-219, at 57 (15 November 2011).

5 Sarbanes-Oxley Act, Pub. L. No. 107-204, § 308(a), 116 Stat. 745 (codified at 15 U.S.C. § 7246(a)).

6 *See* GAO, *SEC Fair Fund Collections and Distributions*, GAO-10-448R, at 31 (22 April 2010).

7 *See* Paul S. Atkins, Comm'r, SEC, *Remarks before the ILR* (16 February 2006) (observing that "*we do not allow any of the funds from the SEC action to be paid to private lawyers*"), http://tinyurl.com/6yxhbt4.

The Fair Funds mechanism is a useful model that the Government could consider for achieving the dual aims of public enforcement and redress. ILR urges the Government to study such alternatives to collective litigation as a means to facilitate redress before seeking to extend, or promote the use of, the UK's collective actions regime.

Answers to the Consultation's Questions

With these overarching themes in mind, we are pleased to provide specific answers to the Government's questions, as follows:

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

In principle, ILR is in favor of the use of specialized courts and tribunals. Institutions with expertise in a particular field are likely to be more efficient at resolving disputes and also better equipped to identify frivolous cases at an early stage. On that basis, ILR supports the proposal to amend Section 16 of the Enterprise Act when considered in isolation.

When considered in the context of the Government's overall package of proposals, however, the proposal to amend Section 16 of the Enterprise Act raises many practical concerns in terms of the volume and nature of the litigation which would come before the CAT. It is apparent that encouraging more litigation would be a deliberate consequence, rather than merely a side effect, of the proposals outlined by the Government. Putting aside the flaws in the proposition that more litigation will encourage economic growth (as to which see question 10), ILR questions whether the Government has conducted a sufficiently robust analysis of the impact its proposals could have for the CAT when considered in their totality. It seems unrealistic, for example, to assume that the CAT, which has historically heard an average of 2.25 cases per year,[8] will not be adversely affected by being called upon to hear not only cases which would presently be brought in the High Court, but also cases which would not have been brought at all but for the Government's proposals, some of which would be opt-out collective actions involving entirely new and untested procedures.

ILR questions why the Government's assessment of the impact of collective actions on court costs only utilizes figures on the number of cases brought in Canada and Australia. The fact that the Government asserts that it does not intend to adopt all of the features of the U.S. class action system does not mean that an extended UK regime would be immune from the abuses seen in the U.S. Accordingly, the frequency and costs of collective antitrust litigation in the U.S. should be taken into consideration.[9] The Government should also study whether, as a result of the multi-jurisdictional scope of EU competition law and the operation of the EU rules on jurisdiction, the UK courts are more exposed to forum shopping by foreign claimants than the courts of non-EU jurisdictions such as Canada and Australia. As explained in response to question 35, the Government should be wary of making the UK even more attractive to forum shoppers than it is already.

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[8] Impact Assessment ¶ 77.

[9] In 2011 there were 235 private putative collective antitrust cases filed in U.S. federal courts, according to U.S. court dockets. Scaled down in proportion with the UK's lower GDP, that level of activity would equate to 36 cases being filed in the UK.

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

As stated in response to question 1, ILR is generally in favor of the use of specialist courts and tribunals where appropriate. On that basis, it has no objection to the CAT, as a specialist competition tribunal, hearing stand-alone cases when that proposal is considered in isolation.

The more fundamental issues at stake here are: (a) the form of stand-alone actions which the CAT should be allowed to hear; and (b) ensuring that the procedures followed in those actions are fair and in accordance with due process.

In relation to the form of stand-alone actions which might be heard in the CAT, collective actions are of particular concern to ILR given its experience with the U.S. class action regime. The Government rightly recognizes that restricting collective actions to the CAT could act as an "additional safeguard" against the use of those procedures in other forums. However, while it would be advantageous to restrict the use of collective actions to a specialist tribunal, this should not detract scrutiny from the shortcomings of the proposed safeguards which would govern the use of such procedures in the CAT. In other words, ILR opposes the use of collective actions as an enforcement mechanism and therefore supports the idea of restricting such actions to a specialist tribunal. However, containment of such actions to the CAT is not sufficient on its own. If collective actions must be introduced in any context, they must be accompanied by adequate safeguards and procedures which adhere to fundamental principles of justice.

Accordingly, ILR objects to the CAT (or the general courts) being allowed to hear stand-alone actions which involve any of the following: capping recoverable costs at an unrealistic level; granting interim injunctions without the applicant's providing a cross-undertaking in damages; departing from the "loser pays" principle where there is a party supporting the litigation with the means to pay adverse costs; and/or allowing presumptions on the quantification of damages. The rationale for each of these objections is more fully explained in the responses which follow.

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

ILR respectfully submits that the Government should not allow the CAT to grant injunctions for two reasons:

First, when considered in the context of the Government's overall package of proposals and its policy of promoting litigation, ILR does not support the proposal to allow the CAT to hear stand-alone actions (see question 2). Nor would ILR support the introduction of stand-alone *collective* actions in any circumstances (see question 13). It is ILR's position, therefore, that the CAT should continue to focus on actions which follow a decision of a competition authority. These decisions already order unlawful conduct to be brought to an end. As a result, the CAT would have no need for the power to grant injunctions.

Second, ILR suggests that, before allowing the CAT to grant injunctions, the Government should give further consideration to enhancing mechanisms by which public authorities can ensure short-term relief is available to alleged victims of unlawful conduct. ILR understands, for example, that the Enterprise and Regulatory Reform Bill, in addition to establishing the new Competition and Markets Authority (CMA), will also lower the threshold for determining when the CMA may grant

interim measures pending the outcome of an investigation. As with other aspects of the Government's proposals, possibilities to augment public enforcement should be fully investigated before taking the risks associated with encouraging private litigation.

If, however, the Government does not agree with ILR's position and goes ahead with its proposal to allow the CAT to grant injunctions, the CAT's discretion to grant such relief should be no broader than that currently exercised by the courts and must be subject to the same safeguards. In particular, an applicant for an interim injunction should always be expected to provide an undertaking in damages in favor of the respondent and, where appropriate, any third parties whose interests may be affected by the relief sought. Without calling into question the competence of those members of the CAT who are not members of the judiciary, ILR respectfully submits that it would also be necessary to ensure that the CAT could not grant an injunction without the President or a member of the panel of chairmen being on the tribunal at the time.

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

ILR is in favor of measures which assist SMEs but is not convinced that creating a fast track route for litigation is necessarily an appropriate means of assisting SMEs which are faced with supposedly anti-competitive behavior.

Competition cases are complicated by nature. Justice must be applied in an even-handed way to all natural and legal persons. To the extent that "fast track" implies cutting due process corners in order to reach a speedy (though somewhat approximate) outcome, then ILR is fundamentally opposed. The burden of proof in factually complex cases should not be adjusted up and down merely as a factor of the size of the party making the allegation. Such a concept gravely offends natural justice.

The consultation paper notes that SMEs may be vulnerable as a result of the OFT not prioritizing local or regional cases. ILR sympathizes with local businesses which cannot obtain the assistance they require but, for the reasons more fully explained in response to question 31, private litigation should not be promoted as a solution to limitations in the public enforcement regime. ILR questions whether other possibilities have been adequately explored, such as enabling local authorities to investigate possible infringements of competition law.

As the Competition Pro-Bono Service (CBPS) indicated, many SMEs who believe they are being subjected to unlawful behavior do not have a strong case and those who do have viable cases may be able to resolve them through other methods, if they are assisted.[10] This suggests that, in the first instance, more should be done to support services like the CBPS which provide advice to SMEs rather than focus on litigation. More should also be done to ensure ADR is available to SMEs where there are genuine legal issues underlying their concerns. As the Government itself has stated in other contexts, litigation should be a last resort.[11] Providing a fast track mechanism, the very

[10] Consultation ¶ 4.29.

[11] See the Ministry of Justice's *Proposals for the Reform of Legal Aid in England and Wales* (November 2010) ¶ 1.8 and also *The Dispute Resolution Commitment: Guidance for Government Departments and Agencies* which, in the context of disputes involving the Government itself, states that "*it is government policy that litigation should usually be treated as the dispute resolution method of last resort*" (¶ 1.4).

purpose of which is to circumvent the traditional safeguards such as the need to establish one's case, would encourage SMEs to attempt litigation before other dispute resolution methods had been attempted.

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

ILR would support reasonable measures to enable SMEs with genuine grievances to obtain justice through the courts if they have been unable to do so by engaging directly with the other parties or, in appropriate cases, using ADR. However, such measures would certainly not include extended collective actions of the kind envisaged by the Government's proposals, nor would they include the kinds of measures proposed by the Government for a fast track route in the CAT, which are entirely inappropriate for the following reasons:

Costs Capping

The proposal on costs capping is both unworkable and unjust. It is also at odds with the statement in the Government's Impact Assessment that "*as companies facing vexatious claims would be able to claim back costs in court if the case is unsuccessful, there would be a zero net cost to business.*"[12] Competition law cases are often extremely complex and may present issues which would not be easy to resolve based on the arguments and evidence contained in a short-form application, even to a member of the CAT's panel of chairmen. As a result, there is a risk that costs caps will be set at inappropriate levels.

This risk is exacerbated by the fact that there is also likely to be insufficient information available at the allocation stage for other parties to assess the issues that might arise and to make meaningful representations on an appropriate costs cap. It is unconscionable that parties in this position would have no right to appeal the decision imposing a costs cap at a particular level and yet, as a consequence of that decision, they may later find themselves unable to recover costs reasonably incurred in defending themselves.

As to the proposed maximum costs cap of £25,000, this figure is far too low for such a complex area of litigation. As stated below in response to question 17, justice requires that a party should receive a full indemnity with respect to legal costs that it was forced to incur by the conduct of another party.

Damages Capping

If the Government plans to take the extraordinary step of dispensing with due process in the name of expediency – for example by allowing fast track procedures to permit approximate results based on cursory assessments – then ILR would support damages capping. In those circumstances, capping the damages available when taking advantage of fast track procedures would be essential to mitigate the potential injustices which those procedures could allow to prevail.

[12] Impact Assessment at 13.

Injunctive Relief

As stated in response to question 3, ILR does not believe it necessary for the CAT to be permitted to grant injunctions. If it is permitted to do so its discretion should not be any broader than that of other courts and should be subject to the same safeguards.

In the context of the proposed fast track, however, there would be real concerns that the CAT, under a simplified procedure, would not possess sufficient information to take decisions on whether imposing injunctive relief would be just and convenient.

Were it possible to apply for injunctive relief using a fast track procedure without giving notice to the respondent, it would be essential that the applicant was under a duty to provide full and frank disclosure to the court. In addition, the requirement to give an undertaking to pay damages to the respondent if the court ultimately holds that the injunctive relief should not have been granted should certainly not be waived or limited.

Even in cases where a defendant was on notice that injunctive relief was being sought, ILR is concerned that a simplified procedure would not provide the respondent with a fair opportunity to oppose such a request. In these circumstances, a claimant should be required to give a cross-undertaking in damages pending a full examination of the merits.

In more general terms, ILR fears that the serious consequences of injunctive relief for respondents is in danger of being overlooked as a result of the Government's apparent desire to lower the threshold for SMEs seeking such relief. In many cases, injunctive relief may have a devastating impact on a business's operations. It is therefore essential that safeguards are in place to protect the respondents. Where procedures are simplified, the importance of such safeguards is heightened rather than reduced.

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

As indicated in response to question 4, ILR believes that the best way of assisting SMEs is to ensure they have the information and assistance they require to understand the competition issues they face and to present their concerns to the relevant parties. ADR also has a valuable role to play in appropriate cases. Litigation should be a last resort, and it is misguided to attempt to assist SMEs by proposing measures which promote litigation. More litigation does not mean greater justice. By proposing measures which would facilitate litigation by creating shortcuts through the courts, the Government actually runs the risk of creating greater injustice.

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 Notion of a Presumption of Loss

ILR strongly opposes the introduction of a rebuttable presumption of loss in cartel cases. The long-standing due process safeguard against frivolous or vexatious claims – that a claimant must overcome the burden of proving its loss on the balance of probability – should only be varied (if at all) in duly justified exceptional circumstances and, in this instance, ILR does not accept that such circumstances have been identified.

Furthermore, the particular presumption proposed by the Government does not stand up to scrutiny. Even if economic literature allowed the firm conclusion that cartels lead to an average 20% overcharge – which it does not – an average of the effects of other, entirely unrelated, cases is of no relevance whatsoever to any particular new case. As the European Commission recognizes in the recent draft guidance paper cited by the Government, estimated overcharges vary enormously. Some cartels are estimated as having overcharged by 50% or more whereas others are estimated as having resulted in no overcharge at all.[13] If statistical averages could be relied upon as a basis for legal presumptions in other areas, absurd results would follow. When sentencing motorists for speeding offenses, for example, it would be absurd to adopt a legal presumption that each motorist broke the speed limit by a specific amount based on an average calculated from previous incidents of speeding, unless the contrary could be proven.

The Government states in its consultation paper that it has considered amending the burden of proof "*to facilitate redress for those who have suffered loss.*" ILR urges the Government to bear in mind that its proposal would also facilitate "redress" for those who have not suffered loss by strengthening the negotiating position of claimants seeking to extract lucrative settlements, possibly with support from third parties. A cartel may be pursued and sanctioned on the basis that it had the *object* of preventing, restricting or distorting competition without it also being shown that it had any such *effect* on competition. If loss could be presumed on the part of purchasers, however, then participants in a cartel would come under increasing pressure to pay compensation rather than risk the additional cost and reputational damage of court proceedings, even though the cartel might not actually have had any effect on market conditions. There may be some truth in the Government's observation that "*the quantifiable effect of [anti-competitive behavior] on intermediate purchasers and consumers is frequently a difficult question with many intricacies and variables*" but the solution to these difficult questions should not be to alter the burden of proof. To do so would risk unjustly enriching claimants and unduly penalizing defendants by ordering them to pay damages which ought to be compensatory.

The proposal is supposedly justified by defendants' "informational advantage" relative to claimants. This concept, however, is far from straightforward. The current rules on disclosure of evidence have proved themselves adequate in other areas of complex litigation, and there is nothing inherently special about competition cases that would merit a new approach. The English rules on disclosure are already perceived as relatively "claimant friendly" when compared to those in other EU jurisdictions – particularly those with civil law systems – and provide an incentive for foreign claimants to attempt to litigate in England and Wales. Creating new presumptions, or otherwise altering procedural rules in claimants' favor, carries the risk of exacerbating claimants' incentives to engage in forum shopping. The negative consequences of this phenomenon are discussed in greater detail in response to question 35.

In addition, effects of cartels are often based on speculative economic theory which cannot be definitively proved either way. A defendant implicated in a cartel which involved market sharing or production quotas will not necessarily be able to isolate and quantify the effect of that conduct on prices. Such defendants may be placed in the impossible position of proving a negative (that their conduct did not affect prices) despite there being no reasonable prospect – absent a legal presumption based only on assumptions about unrelated cases – of the claimants proving such an effect did exist, even with full access to the available evidence.

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[13] European Commission 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*, at 42.

Finally, ILR urges the Government to consider the effect that introducing such a presumption could have for forum shopping. By introducing a presumption of this kind, England and Wales would become a draw jurisdiction for competition claims to an even greater extent than it is already. While this might be welcomed by English law firms, the Government would be wise to also consider the attractiveness of collective litigation involving presumptions on the quantification of damages from the perspective of businesses looking to carry on business in the jurisdiction (see question 35).

The Appropriate Figure for Such a Presumption

It follows from the issues of principle raised above that there is no appropriate figure for a presumption of loss, but regardless, the proposed figure of 20% which the Government has seized upon is too high. The Government claims that the figure of 20% "*represents the lower end of the range,*" yet this cannot be true given that it is the mean average of a sample of estimates.

It is also important to keep in mind that all figures cited for cartel overcharges are merely estimates rather than the result of direct observation, since it is impossible to know what prices would have been charged "but for" the existence of a cartel. While the research conducted for the Commission did estimate the mean average to be "around 20%," it also recognized – as the Commission rightly acknowledged in its draft guidance paper – that care must be taken in interpreting such statistics.[14] In particular, the methodology used in that research may give greater attention to those cartels which actually affect price than those which do not. This potential bias is one of a number of methodological problems with the estimation of overcharges which have been identified by Boyer and Kotchoni.[15] Their analysis estimated a bias-corrected mean overcharge of 17.5%, and that figure is reduced still further, to 13.6%, if estimates outside the range of 0-50% are excluded. This shows that, even if a presumption of loss could be justified, and even if it were accepted that such a presumption should be based on the best estimate of the mean average overcharge, the figure of 20% is still too high.

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

As a matter of principle, claimants should only be awarded damages as compensation for loss they have actually suffered. Accordingly, it should be possible for a defendant to raise as a defense the fact that an overcharge (if proved) was passed on by the claimant. Equally, it should also be possible for a defendant to raise as a defense against an indirect purchaser the fact that an overcharge (if proved) was not passed on to the claimant. ILR supports the use of the passing on defense but is not aware of any significant impediment to raising this defense at present and therefore questions the need for legislation.

As a further point, ILR disagrees with the Government's view that an expanded regime for collective actions would warrant consideration of mechanisms for the apportionment of damages between direct and indirect purchasers. The potential for conflicts between sub-classes of claimants is one of the procedural difficulties associated with collective litigation. Such issues may be complex

[14] *Id.* ¶ 121 and *n.* 125.

[15] Michael Boyer and Rachidi Kotchoni, *The Econometrics of Cartel Overcharges*, (21 March 2011, Revised 10 August 2011).

and expensive to resolve but it should be for each sub-class of claimants to prove its loss rather than for the court to apportion damages between them.

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.

ILR questions the Government's view that the current collective action regime is inadequate. Based on its experience of more far-reaching collective action regimes in other jurisdictions, ILR also cautions the Government against extending and strengthening the current regime in the UK.

The Government's view that the current collective action regime is inadequate seems to stem partly from the fact that only one body has been certified as being capable of bringing collective actions and that body has only brought one case. In ILR's view this fact raises questions about the appetite and need for collective litigation, rather than an argument in favor of introducing it. As explained in response to question 22, there are serious risks associated with allowing too broad a range of parties to commence collective actions.

The Government's view also stems from the fact that only one case has been brought under the current regime and only a small proportion of eligible consumers chose to participate. This appears to be the basis for the conclusion that the current regime "*is inadequate in delivering fair redress for consumers and businesses.*" While ILR understands the Government's desire to provide effective mechanisms for redress, it is very dangerous to assume that extending the scope for collective actions in the UK will result in redress which could consistently be described as fair. As explained in response to question 10, such a policy might increase the volume of litigation in the UK but not the quality of justice, and it will also introduce the potential for new forms of abuse. There are a number of possible reasons why so many eligible people did not participate in the *JJB Sports* case, but, as explained in response to question 14, the costs of allowing third parties to represent such persons' claims without their consent outweigh the potential benefits.

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 discussed in the introduction, ILR does not believe that the Government has demonstrated a need for extending collective actions in the competition arena, and, thus, as a threshold matter, ILR respectfully does not believe that the proposed policy for extending such actions is correct.

In addition, ILR generally opposes the policy objectives set out in the Consultation to the extent they would result in the privatization of competition law enforcement. As ILR discusses in the introduction, competition law enforcement is, and should remain, the responsibility of competition authorities, which have the expertise and the policy judgment to carry out enforcement properly.

Taking into account redress, deterrence, and the "need for a balanced system," ILR believes that effectively privatizing an element of competition law enforcement is the wrong policy objective.

- ***Redress.*** There are far less dangerous ways of increasing consumer redress (to the extent that it is necessary) than promoting private collective actions. As noted in the introduction,

alternative methods, such as the SEC's Fair Funds, exist to combine public enforcement with redress for consumers. ILR urges the Government to consider such an option as a superior means of providing redress to consumers as compared to private collective actions. This is especially true because representative claimants in collective actions are, at bottom, self-interested, and therefore are not as well positioned as public authorities to seek redress on behalf of entire groups of consumers. Moreover, ILR emphasizes that, to the extent a consumer or business wishes to obtain redress for a perceived competition law infringement, nothing in current law prevents it from filing an individual lawsuit seeking compensation.

- ***Deterrence.*** Deterrence also will not be enhanced by promoting the use of private collective actions. Enforcement by public authorities, who are charged with considering when enforcement is in society's best interest, provides the correct level of deterrence against misconduct. Private collective actions threaten to over-deter – that is, to chill legal conduct because companies rightly fear frivolous collective suits brought by aggressive claimants backed by lawyers and litigation funders. Over-deterrence has been a feature of U.S. class actions, especially in the tort arena, since claimants' lawyers in the U.S. have become adept at devising and suing on new theories of liability, which has had the effect of penalizing companies for conduct that was not improper at the time they engaged in it.[16]

- ***"A Balanced System."*** ILR fundamentally believes that there is no way to have a "balanced system" once private collective actions of the sort envisaged by the Government are introduced. Such actions would be *inherently* coercive, as ILR discusses at length in the introduction. Given ILR's view that the consultation does not demonstrate any threshold need to promote, or extend the regime for, private collective actions, we believe that the potential unintended consequences of adopting the policy proposals contained in the Consultation outweigh any possible benefits.

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

Again, as discussed in the introduction, in response to question 10, and throughout this response, ILR believes that private collective actions are not, and will never be, an effective or beneficial way to enforce competition law. Instead, enforcement of competition law should be reserved to competition authorities. ILR believes neither businesses nor consumers should be empowered to bring such actions, and the Government should not interpret the low uptake of the existing regime for consumer collective actions as indicating a need to facilitate collective actions of any kind.

[16] For example, one study by the RAND Institute for Civil Justice found that in the medical-devices and pharmaceutical industries, some products have been removed from the market unnecessarily, and other products are more expensive than they would otherwise be, as a result of manufacturers' concerns over potential tort liability. *See* Steven Garber, *Product Liability and the Economics of Pharmaceuticals and Medical Devices*, RAND Institute for Civil Justice (1993), at 103 and 122.

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

ILR has no specific comments on whether restrictions should be introduced to prevent collective actions from being used as vehicles for anti-competitive information sharing, save that it sees no reason why existing competition rules would not be applicable to such circumstances. Any concerns raised about the possibility of collective actions being used as a vehicle for unlawful conduct merely provide a further reason why such actions should not be extended to the UK.

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

Collective actions should be limited to follow-on actions, if permitted at all.

As ILR discusses at length in the introduction and in its answer to question 14, collective actions are inherently prone to abuse by claimants, lawyers, and funding companies seeking to exploit the potential ruin a collective action could bring to a company in order to obtain an unjustified settlement. If such actions are to be promoted, limiting such actions to situations in which a competition authority has proven an infringement is therefore proper.

Moreover, as ILR also discusses in the introduction, public enforcement authorities are the correct bodies to decide whether to bring enforcement actions. As ILR notes in the introduction and in its response to question 22, rather than facilitate private collective redress, the better course of action would be to consider alternatives which combine public enforcement with mechanisms to provide redress – this might include consideration of a mechanism similar to the SEC's Fair Fund.

Finally, ILR notes that the Government's Impact Assessment states that "*[c]ollective actions are particularly uneven in how the benefits fall year by year, as they involve fewer, larger cases. Some experts have stated they would not expect any stand-alone cases, reducing deterrence and eliminating the cartel prevention benefits.*"[17] This calls into question why the Government is even considering running the risk of introducing collective stand-alone actions.

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

To the extent the Government decides to extend the UK regime for collective actions, it should certainly not implement opt-out actions, which pose dangers both to claimants and to defendants.

Danger to claimants

Opt-out collective litigation should be rejected because of its negative consequences for claimants. Most notably: (1) it leads to internal (intra-class) conflicts; (2) it causes conflicts between the claimants and the lawyers purporting to represent them; and (3) it can create litigation risks for

[17] Impact Assessment at 4 (Summary of Policy Option 3).

claimants without their knowledge or agreement. All of these effects harm businesses and consumer claimants and degrade their ability to obtain effective redress.[18]

First, opt-out systems carry a strong risk of internal class conflict because claimants often suffer disparate losses – and thus have different motivations in pursuing litigation. This would be particularly true in collective competition cases, where the claimants may include direct and indirect purchasers, large corporate customers, and individual consumers. In such circumstances, particular claimants within the class will have different strategic interests regarding the course that the case should take and the distribution of any judgment or settlement award. This can mean that decisions regarding how to prosecute the claims and how to distribute any award are driven by the largest claimants, sometimes with limited regard for individual consumers.

Second, in addition to intra-class conflicts, opt-out procedures also lead to conflicts between the class and the claimants' counsel. In a large collective action, the average claimant has very little money at stake – and, consequently, little interest in the progress of the case. Thus, the average claimant (assuming he or she even knows about the suit) merely waits until the court awards damages or the defendants settle. The claimants' counsel, by contrast, invests significant resources in the case. As a result, the lawyer fully controls the case without any real client accountability. The lawyer also bears the risk of loss if the case is not successful. This is the prevalent model in the U.S., where claimants' lawyers typically are paid on a contingency fee basis, and it would be replicated in the UK with respect to cases in which claimants' lawyers work under conditional fee agreements or, if the Government departs from the proposals outlined in the Consultation, under U.S.-style contingency fee agreements. (This is an additional reason why ILR opposes contingency fees in collective cases, as addressed more fully in answer to question 19, below.)

The fact that the lawyer controls the litigation – rather than the individual claimants – means that the lawyer must settle any intra-class conflicts that arise among different strata of class members. This threatens to create additional conflicts of interest between the class members (or some strata of them) and their lawyer, especially if the class includes large corporate claimants that the lawyer may favor over individual consumers.

In addition, the gap in resource investments between the lawyers and the claimants typically leads to a disparity in risk preferences. The claimants, who have invested nothing in the case, are willing to go to trial to attempt to win a significant damages award. The lawyer, on the other hand, is less eager to "roll the dice" at trial, preferring instead to enter into a settlement that minimizes risk and maximizes fees.

This inherent tension between class counsel and the class members leads to what critics call "collusive settlements" or "sweetheart settlements" – settlements that the claimants' lawyer negotiates with the defendant primarily for his or her own benefit. Because opt-out collective actions include all potential claimants who do not opt-out, and thus preclude nearly all future litigation concerning the same subject matter as the collective action, they provide defendants the opportunity to buy nearly total peace from the claimants' lawyer who controls the litigation. And because the claimants' lawyer is the only person on the claimants' side with a significant interest in

[18] *See*, *e.g.*, John Bronsteen, *Class Action Settlements: An Opt-In Proposal*, 2005 U. Ill. L. Rev. 903; John Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370 (March 2000).

the case, the lawyer is typically willing to agree to any terms offered by the defendant that will reimburse the lawyer's investment and provide him or her a profit.

The most notorious examples of sweetheart settlements are the infamous "coupon settlements," in which defendants pay significant lawyers' fees directly to class counsel and provide low-value coupons for the defendants' products or other low-value awards to the class members. U.S. class actions had a long and tortured history with coupon settlements until the enactment of reform legislation in 2005, which limited the practice. Before that reform, one of the most infamous coupon settlement cases was *Kamilewicz v. Bank of Boston Corp.*[19] In that case, the plaintiffs were borrowers from the defendant mortgage bank. They alleged that the defendant held too much money in escrow with respect to their mortgage loans. As a result of a sweetheart settlement in the case, each borrower had a miniscule sum of up to $8.76 added to his or her escrow account, while class counsel received between $8.5 and $14 million in fees. Even more shockingly, under the sweetheart settlement, the bank withdrew up to $90 from each plaintiff's escrow account to pay class counsel's fees. The end result was a net *loss* for the plaintiffs and a windfall for the lawyers who purportedly represented them.[20]

The collusive-settlement problem is exacerbated when multiple lawyers file nearly simultaneous, collective, opt-out litigation. Because only one of the cases can ultimately proceed under U.S. law, the lawyers often enter into a bidding war with the defendant, each seeking the defendant's acquiescence to the certification of their class, in return for a diminished settlement demand. Great care needs to be taken in the UK to prevent similar situations.

Conflicts between class members and their counsel are exacerbated in opt-out cases because the claimants are generally apathetic and uninvolved. By contrast, where claimant classes are limited to those claimants who affirmatively choose to become active members of the class, the classes tend to include only claimants who are personally and actively interested in pursuing their rights. Thus, the likelihood of conflicts between claimants and the lawyers representing them is greatly diminished.

Third, the creation of an opt-out system can expose consumers to direct litigation risks, such as court-imposed obligations, penalties or costs awards. The UK currently has the loser-pays costs system (what in the U.S. is called the "English Rule"), which is critical to deter abusive litigation and should not be altered. In the absence of a rule to the contrary, a representative claimant, or even those represented in a collective action, could be exposed to liability for adverse costs. Yet under an opt-out system some of those represented might have little or no knowledge of the case. In order to avoid such consequences for claimants, if an opt-out regime were implemented, the Government might consider relaxing the loser-pays rule. Relaxing the rule, however, likely would have severe negative consequences – the rule is rightly seen as one of the UK's primary bulwarks against lawsuit abuse. The tension between the loser-pays rule and opt-out collective actions is thus yet another reason why the Government should not adopt an opt-out system.

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[19] 100 F.3d 1348 (7th Cir. 1996).

[20] Bank of Boston was just one of a number of cases illustrating the dangers of collusive settlements. For additional examples, see John Beisner, Matthew Shors, and Jessica Miller, *Class Action "Cops:" Public Servants or Private Entrepreneurs*?, 57 Stan. L. Rev. 1441 (2005).

Danger to defendants

Opt-out collective actions carry a further risk of abuse because they impose substantial settlement pressure on defendants, independent of the merits of the litigation. As adopted in the U.S., for example, the opt-out procedure allows plaintiffs to subject defendants to massive potential financial exposure simply by filing suit – the class action filing automatically brings every putative class member's claim into the proceeding. The settlement pressure generated in such circumstances is so great and so disconnected from the merits of the case that prominent American jurists have taken to calling such settlements "blackmail settlements."[21] Moreover, the pressure on defendants to settle claims regardless of merit incentivizes claimants' lawyers to file non-meritorious claims. Opt-out procedures thus inevitably lead to lawsuit abuse.

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

Before answering this question, ILR commends the Government for recognizing the importance of certification as the chief safeguard against abuse in collective actions. The Consultation, however, does not address the primary reason *why* certification is so important: it requires that before a collective action is permitted to proceed on its merits, a court must determine that all of the claims of the proposed group members can be adjudicated fairly in a single proceeding and established through common proof. More specifically, certification means that courts decide whether the proposed collective action comports with the principle that "trial for one can serve as trial for all" – i.e., the relevant facts and law as to each group member's claim are such that adjudicating the representative claimant's claim (or significant issues related to that claim) necessarily resolves the claims (or the same significant issues) for the group members.

ILR generally agrees with the elements of certification set forth in the Consultation, with these observations:

- Numerosity need not entail a specific numerical threshold – rather the question is whether the claims in a putative collective action are so numerous that proceeding on a collective basis is the best method for resolving them. Indeed, ILR believes the numerosity element of certification should not be a simple numerical threshold, lest courts begin merely to count claimants, rather than engage in a careful certification analysis.

- The likelihood of success of any collective action – while an important element in determining whether a collective action should be permitted to proceed – should be decoupled from the certification analysis and should instead constitute its own preliminary merits test, which would occur after a case is certified. ILR commends the Government for recognizing the value of a preliminary merits test for weeding out spurious collective actions. ILR believes, however, that the preliminary merits test should not be part of the certification test. By splitting these two tests and sequencing them so that certification comes first, this permits the court to limit disclosure to documents relating only to certification issues during the certification test, and not to the underling merits of the dispute. This saves costs, because, if the case is not certified, additional disclosure of documents will not be necessary.

[21] *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Judge Henry Friendly).

Finally, ILR notes that the "typicality" element of the certification test – which the Consultation includes – shows why representative organizations are not proper candidates to bring collective actions. The typicality element is intended to ensure that only those claimants who advance the same factual arguments may be grouped together in a class action. The typicality requirement thus protects class members by ensuring that the representative claimant's incentives align with those of the class members, and that it can fairly represent their interests. Obviously, a representative organization is not "typical" of the consumers constituting a group of claimants. Such organizations therefore are not good candidates for spearheading collective actions.

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

Treble and punitive damages should be prohibited in collective actions. As discussed in the introduction and in response to questions 13 and 14, such actions already pose the risk of abuse because of outsized awards. Providing for treble and punitive damages will only increase the risk of abuse by increasing claimant leverage. Indeed, the Government itself recognizes the dangers of treble damages.[22]

Moreover, the primary purpose behind treble and punitive damages is not to compensate victims, but rather to punish wrongdoing and thereby deter it in the future. As a deterrence mechanism, treble and punitive damages are thus a form of law enforcement that ILR believes should be reserved exclusively to competition authorities, as discussed in the introduction and in ILR's response to question 22.

Finally, an additional purpose of treble damages in the U.S. is to compensate claimants who have had to pay lawyers' fees pursuing an infringer, but such a rationale is not present in the UK, which currently employs the loser-pays rule. ILR discusses the importance of maintaining the loser-pays rule in its answer to question 17.

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

The loser-pays rule should certainly be maintained in collective actions. As a matter of principle, it would be grossly unfair for parties which successfully defend collective actions not to be indemnified in respect to the costs they have been forced to incur. It would also contradict the Government's claim that, disregarding damages paid out by companies which lose cases, these proposals would involve zero net cost to business.[23]

As the Supreme Court of Canada has recognized, "*there is no magic in the form of a class action proceeding*" that means a successful party should not be entitled to its costs.[24] While some representatives and lead claimants may claim to be acting in the public interest, the way class actions have developed in the U.S. demonstrates that they are primarily used for obtaining substantial sums of money for private parties. In any event, the reason why a claim is brought will rarely justify depriving a

22 Consultation ¶¶ 5.33, 5.40.

23 Impact Assessment at 13.

24 *Kerr v Danier Leather Inc* [2007] SCC 44, 286 DLR (4th) 601 [66].

defendant which has been vindicated in court of the right to recover its costs. If a party decides to bring a test case, for example, and fails, then the defendant should not be penalized. If such a case stands to advance important societal issues then it should be supported using public funds.

The loser-pays rule already applies as the default option for class actions in several Canadian provincial jurisdictions, in Australian federal class actions, in class actions in the Australian State of Victoria and in group litigation in England and Wales.[25] There is simply no justification for collective actions in the field of competition law being treated differently.

The prospect of parties to litigation having to pay the costs of the other side if they lose also creates an important deterrent against claimants commencing frivolous or speculative claims and against defendants maintaining unmeritorious defenses. Nowhere is the need to deter frivolous or speculative claims greater than in the context of collective litigation, because a number of features of collective litigation make it particularly prone to such claims. The U.S. experience with class actions shows that there may be instances where defendants are pressured into settling cases regardless of their merits simply due to the scale of damages involved or to avoid the reputational risk of contesting them. This is one of the reasons why ILR urges the Government not to extend the existing collective action regime (see question 14) but, if the regime is extended, then ensuring that claimants (or the third parties which promote or fund their cases) may potentially be liable for defendants' costs in addition to their own will be an essential safeguard to deter "blackmail settlements."

Rather than merely maintain the loser-pays rule in collective actions, ILR suggests that it could be employed as a useful tool to combat some of the problems with collective actions which have been witnessed in other jurisdictions. For instance, there is a risk in collective actions that claimants who are represented by another party and play no active role themselves can become dissociated from the process. Indeed, under an opt-out system some claimants will not only be uninterested in the claim, they will be completely unaware that their rights are being determined. Requiring that claimants must opt-in and potentially contribute to the defendant's costs if the claim is unsuccessful would incentivize claimants to monitor and regulate the conduct of those who claim to represent their interests.

An alternative approach which has been adopted in the Canadian province of British Columbia is to apply the loser-pays rule as the default option only where a case is dismissed prior to the class being certified.[26] Although this is preferable to the loser-pays principle being abandoned altogether, it risks exacerbating still further the significance of collective actions being certified. This stage already represents a significant threshold in collective actions, because at this point the pressure on a defendant to settle increases dramatically. Suddenly removing the prospect of being able to recover costs if the claim is successfully defended (absent exceptional circumstances) can only serve to amplify this effect. It is imperative that the loser-pays rule be maintained in collective actions and apply at all stages of proceedings.

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25 Professor Rachael Mulheron, *Costs Shifting, Security for Costs, and Class Actions: Lessons from Elsewhere* in Dwyer, D. (Ed.) *The Tenth Anniversary of the Civil Procedure Rules*, Oxford: OUP, page 189.

26 *Id.* at 190.

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

(a) Departing from the loser-pays rule in the interests of access to justice

As a preliminary issue ILR would like to emphasize that "access to justice" should not be equated with "access to litigation" and still less with "access to collective litigation." In view of their procedural complexity, excessive cost, and potential for abuse, collective actions are simply not an effective means of delivering justice. Relaxing the loser-pays rule in order to facilitate collective actions would involve removing a key deterrent to frivolous litigation in precisely the area where it is needed most.

One area in which the loser-pays rule has traditionally been relaxed in the interests of access to justice is in legal aid cases. ILR understands, however, that it is not the Government's intention for collective actions for breach of competition law to be brought using legal aid. Instead, they are likely to be commenced, or supported, by a combination of: (i) representative organizations; (ii) legal expense insurers; (iii) law firms; and/or (iv) third party litigation funders. In circumstances where those parties promote collective actions, and may stand to benefit from them financially to a greater extent than individual claimants, it is important that they should be exposed to liability for adverse costs.

The overarching point here is that there are a variety of ways in which collective actions may be funded to ensure "access to justice," and regardless of the means of funding, it should be possible to maintain the loser-pays principle:

- Where a claim is supported by a fund set up for the purpose of funding litigation, then the fund can meet any order to pay adverse costs. The Ontario Class Proceedings Fund, for example, takes on liability for successful defendants' costs in cases that it supports.

- While there are considerable risks involved in allowing third parties to invest in litigation, to the extent that it is permitted, those third parties should certainly be fully liable to pay adverse costs. Lord Justice Jackson concluded that there was no evidence that funders being liable for adverse costs would have a chilling effect on the provision of litigation funding.[27]

- If, contrary to the Government's stated intention, lawyers were allowed to fund collective actions before the CAT on a contingency fee basis, they should be liable for adverse costs.

- Because collective actions generally aggravate the costs to defendants beyond the costs in non-collective cases, representative claimants seeking to commence collective actions should be required to demonstrate that they could satisfy an order to pay adverse costs before they are allowed to proceed.

[27] Jackson LJ (2009) *Review of Civil Litigation Costs: Final Report*, Chapter 11, ¶ 4.5.

- Alternatively, claimants represented in collective actions could be required to contribute to adverse costs as a matter of course. The potential for claimants to share costs is said to be one of the advantages of collective actions, and there is no reason why this rationale should not apply to liability for adverse costs as well as claimants' own costs.

As a result, there will be few cases, if any, which would justify a departure from the loser-pays principle, and it should be possible for the courts to deal with those cases by exercising their existing discretion with the loser-pays rule remaining the default position.

(b) Departing from the loser-pays rule where the costs of the claimant could be more appropriately met from the damages fund

ILR believes that the loser-pays rule should be the default option in all cases, whether it operates to the benefit of a successful defendant or a successful claimant. Unless a representative claimant has been penalized on assessment of costs for the way it conducted the case, it seems reasonable that it should be able to recover from the damages fund any shortfall between its award of adverse costs and its actual costs.

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

ILR opposes contingency fees in collective actions. ILR agrees with the Government that such fees have no place in collective actions.[28]

Contingency fees give a claimant's lawyer a direct financial interest in the claimant's potential award. This structure *inherently* creates a potential conflict between the lawyer's ethical duty to zealously represent the client in pursuit of justice and the lawyer's own financial interest in maximizing any recovery. As noted above in response to question 14, this problem is particularly acute in the collective-litigation arena, because contingency fees incentivize lawyers to commence collective actions to extract the highest possible settlement and take a contingency fee, even though the resulting award to individual claimants may be negligible. Moreover, collective actions are expensive, and this exacerbates the dangers posed by contingency fees. Indictments of a well-known U.S. claimants' law firm and several of its partners in recent years, and ongoing criminal investigations into law firms and professionals involved in asbestos-related insolvency cases in the U.S., illustrate how the inherent tension between the interests of the claimant and the lawyer on contingency can affect the integrity of the judicial process.

Not only do contingency fees pose ethical concerns, but they also incentivize bad behavior by representative entities – which is another reason why representative organizations should not be permitted to bring collective actions, as discussed in response to question 22, below. Under the Government's proposals, representative organizations would be repeat players in collective litigation. Under a traditional fee arrangement based on lawyers' hourly rates, representative organizations would be responsible for the full costs of their litigation as those costs are incurred (notwithstanding that they may later recover some of their costs from the other side if successful). They must therefore ensure that they spend their resources wisely and limit themselves to litigation in which success seems at least reasonably likely. But in a contingency fee regime, the organization can spread

[28] Consultation ¶ 5.33.

its costs: it can offset the costs from unsuccessful suits against its contingency recoveries from successful suits, a possibility that will make organizations more inclined to pursue less certain claims.

This negative influence of contingency fees on conduct is not limited to organizational claimants, however, since contingency fees also incentivize lawyers to approach individuals who will agree to serve as lead claimant for a collective action, even though those individuals may never have decided to pursue litigation on their own.

As a practical matter, the extent to which contingency fees incentivize frivolous litigation depends on the magnitude of the permissible contingency – the larger the contingent recovery, the greater the incentive for lawyers and claimants to press claims of questionable merit. This is why contingency fees – which give lawyers a direct stake in the *amount* of money extracted from a defendant – are more troubling than conditional fee agreements, which merely reward a successful conclusion to difficult litigation but do not directly reward the lawyer for driving up the amount of damages. The modern practice of law is a business, and contingency fees create a market reward for maximizing the damage inflicted on a defendant. And just as the legal culture of England and Wales shifted to accommodate and ultimately embrace conditional fee agreements, it ultimately will shift to make the most profitable use of contingency fees, should they be allowed.

ILR is especially concerned with the contingency fee issue because the Legal Aid, Sentencing and Punishment of Offenders ("LASPO") Act 2012 will permit contingency fees in English litigation when it enters into force, and so secondary legislation will be required if the Government is to prevent them from being used in collective actions before the CAT. ILR opposed the move to permit contingency fees in English litigation when it was recommended by Lord Justice Jackson on the grounds noted in this answer. ILR notes that Jackson LJ proposed a safeguard to the use of contingency fees – that "*no contingency fee agreement should be valid unless it is countersigned by an independent solicitor, who certifies that he or she has advised the client about the terms of that agreement.*"[29] ILR is concerned that even if the Government were minded to implement such a safeguard, it would not be strong enough to overcome the real dangers posed by contingency fees. As an overarching matter, ILR is concerned that the LASPO Act 2012 reflected a troubling trend of encouraging private litigation in the UK. The current Consultation, with its implicit aim of partially privatizing competition enforcement through the use of collective actions, continues this trend. ILR fears – and the Government should fear – that UK private litigation is now on a slippery slope, at the bottom of which are U.S.-style class actions and the many abuses they entail.

Finally, ILR notes that, in all of these respects, contingency fees present the same dangers as funding by third party litigation funders. In answer to question 22, ILR explains why permitting such funders to *bring* collective actions is dangerous. ILR notes here that even permitting such funders to *fund* collective actions is dangerous. Experience has shown that such funding encourages the filing of frivolous litigation and exerts undue settlement pressure on defendants by providing claimants with the resources to continue litigating claims regardless of merit. These dangers are exacerbated in collective action proceedings, which already exact substantial leverage against defendants based on their sheer size and the potential for enormous exposure (regardless of merit), as noted throughout this response.

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[29] *Final Report* at 132.

Third party funding also exacerbates another fundamental problem with collective litigation – that it is generally controlled by lawyers rather than by group members. When a third party funder is involved in collective action proceedings, the claimants (who generally have only a small stake in the outcome) are squeezed out of the picture, and the lawsuit essentially becomes a collaboration among the lawyer and the funder. Thus, the funding company will have the power to steer the direction of the litigation – and it will have every incentive to do so in a way that serves its pecuniary interests, rather than the claimants'.

In Australia, where third party funding of class actions is so common that class actions are considered investment vehicles, many judges, scholars, defense lawyers and other critics have expressed serious reservations about the practice.[30] Recently, Federal Court Chief Justice Patrick Keane gave an interview to *The Australian Financial Review* in which he expressed his concerns, especially those about excessive fees charged by third party funding companies and their support for non-meritorious claims.[31]

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.

ILR opposes *cy pres* awards on the basis that it gives rise to a number of issues, some of which are acknowledged in the Consultation. ILR is not convinced that these problems would be adequately addressed by restricting payments of unclaimed sums to a single specified body or, for that matter, by adopting any other means of distributing unclaimed sums.

The goal of collective actions, if implemented, is to provide compensation to consumers who have actually been injured by the infringing defendant. Just as private collective litigation does not have any proper role in law enforcement, it is also ill-suited to promote social objectives through *cy pres* awards distributions. *Cy pres* awards do not provide compensation to injured group members, and thus depart from the objective of enabling consumers and businesses to obtain redress from those undertakings which have caused them harm. The bedrock of civil justice is that a claimant who is injured can seek compensation for his or her injuries; using civil litigation to redistribute wealth to charities – at the expense of group members – turns that fundamental goal on its head. As Professor Martin Redish of Northwestern University School of Law aptly put it: *cy pres* awards merely "*creat[e] the illusion of compensation.*"[32] This fundamental objection to damages being paid to entities which have not themselves suffered harm at the hands of the defendant cannot be avoided by specifying a single entity to receive unclaimed sums.

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30 *See, e.g.*, Professor Michael Legg, Associate Professor, Faculty of Law, University of New South Wales, Australia, *Litigation Funding in Australia: Identifying and Addressing Conflicts of Interest for Lawyers*, February 2012, in which Professor Legg concludes that "*[t]he combination of influence and incentives created by litigation funding arrangements create an array of conflicts of interest for the lawyer. Lawyers have sought to address conflicts of interest through seeking informed consent in the funding arrangements or by recommending the obtaining of independent legal advice ... However, concern remains as to whether lawyers and funders have identified all possible conflicts. The above discussion about the structure of proceedings and appeals suggests they have not.*" Available at: http://www.instituteforlegalreform.com/sites/default/files/Litigation_Funding_in_Australia.pdf.

31 *See* Jennifer Ball, *Australia: Litigation Funding in Policy Vacuum*, Australian Fin. Rev. (Oct. 14, 2011).

32 Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 649 (2010).

Experience in the U.S. demonstrates that *cy pres* awards often spawn conflicts of interest between the presiding judge and the absent group members and between group counsel and the group. In class actions, the lawyers often propose a *cy pres* award that benefits a charity with which the judge or his or her family is affiliated. This creates – at the very least – an appearance of impropriety. As one critic of *cy pres* relief noted: "*allowing judges to choose how to spend other people's money 'is not a true judicial function and can lead to abuses.*"'[33] *Cy pres* awards also create the potential for conflicts of interest between group counsel and the absent group members, particularly where group counsel has a relationship with the recipient charity. One class action settlement in a U.S. antitrust case, for example, included an award of $5.1 million of unclaimed settlement funds to the claimants' lawyer's alma mater.[34] The diversion of funds to an organization in which class counsel has such a personal interest clearly runs counter to class counsel's duty to "*fairly and adequately protect the interests of the class.*"[35]

In addition, *cy pres* awards create the potential for representative parties to steer money to a favored charity to satisfy their own financial interests. For example, in a recent AOL *cy pres* settlement that was heavily criticized in the U.S., one of the named claimants was employed by one of the recipient charities.[36] *Cy pres* awards, accordingly, must not be available in collective cases and unclaimed awards should be returned to defendants.

Specifying a single entity to receive unclaimed funds may address some of the potential conflict of interest problems, but the problem remains that damages should not be paid to a recipient which has not suffered harm at the hands of the defendant in the first place. This problem would certainly not be solved by the even more objectionable option, raised in the Consultation, of transferring unclaimed sums to the Treasury. ILR agrees with the observation made in the Consultation that, in follow-on claims, this would effectively involve a second fine being imposed purely on account of claimants having failed to come forward.[37]

Instead, the Government should avoid creating a regime in which damages may be awarded but not claimed by the people they are intended to compensate. In other words, the very possibility of unclaimed sums provides yet another compelling reason to avoid an opt-out regime. If such a

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33 Adam Liptak, Doling Out Other People's Money, N.Y. Times, Nov. 26, 2007, *available at* http://www.nytimes.com/2007/11/26/washington/26bar.html (quoting former federal judge David F. Levi); *see also In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 236 F.R.D. 48, 53 (D. Me. 2006) ("Federal judges are not generally equipped to be charitable foundations: we are not accountable to boards or members for funding decisions we make; we are not accustomed to deciding whether certain nonprofit entities are more 'deserving' of limited funds than others; and we do not have the institutional resources and competencies to monitor that 'grantees' abide by the conditions we or the settlement agreements set.").

34 *See* Ashley Roberts, *Law School Gets $5.1 Million to Fund New Center*, GW Hatchet (3 December 2007).

35 Fed. R. Civ. P. 23(a)(4); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent."); *Sipper v. Capitol One Bank*, No. CV 01-9547, 2002 WL 398769, at *4 (C.D. Cal. Feb. 28, 2002) ("A central concern of the Rules of Civil Procedure governing class actions is ensuring that the class action format is not hijacked by parties . . . to their own ends at the expense of the other class members.").

36 Brief for Objector-Appellant at 7-8, *Nachsin v. AOL, LLC*, No. 10-55129 (9th Cir. 20 July 2010).

37 Consultation ¶ A.24.

regime were introduced then unclaimed sums should be returned to the defendant. Contrary to the point made in the Consultation, returning unclaimed awards to defendants would not result in a windfall to defendants. The English courts oversee an adversarial system in which a claimant must come forward and prove that the defendant damaged the claimant by violating the law, and that the defendant must therefore pay damages to the claimant. If potential claimants elect not to do so – for whatever reason – then the defendant should not be obligated to pay damages with respect to that particular claimant. That the claimant may be a member of an opt-out group as a procedural matter does not change this fundamental feature of English law.

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?

Again, ILR opposes *cy pres* awards. The Access to Justice Foundation, whatever its merits, is designed to increase claimant access to courts. The organization is not specifically concerned with providing redress to victims of competition law infringements. It is thus not an appropriate recipient of unclaimed competition enforcement awards and this further demonstrates why *cy pres* is such a bad idea. Moreover, the difficulty of identifying an appropriate recipient of *cy pres* awards further demonstrates why, if the Government does elect to implement collective actions, they should be opt-in actions only, which would negate the problem of unclaimed awards.

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 a threshold matter, and as discussed above in response to question 14, ILR opposes opt-out collective actions. But, if the Government nevertheless decides to facilitate such cases, then spearheading them should be solely the responsibility of a competition authority, which has the expertise to apply policy judgments in making enforcement decisions. As discussed in the introduction, public enforcement of competition law by competition authorities is superior to private enforcement. Because government regulators have experience and expertise in the areas that they regulate, they are far better positioned than private individuals to ascertain whether and to what extent competition law infringements actually occur. Government regulators are also better positioned to make the policy judgments that surround every enforcement decision than private claimants who have a direct financial stake in a matter.

Private bodies, like representative organizations, are especially improper candidates for bringing collective cases. Although private representative organizations can play a valuable societal role, their work often involves advocating for the interests of particular groups, interests or causes, and in some cases seeking money from public and private sources to do so. For that reason, ILR is concerned that private representative organizations likely would recruit claimants to highlight particular causes, not to assist them in obtaining fair compensation.

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 discussed in ILR's answer to question 19, permitting law firms or third party funding companies to gain control over a collective action through contingency fees or funding invites abusive behavior by those entities. This abuse would be even more pronounced if the law firms or funding companies could actually *bring* collective actions, as opposed to merely *funding* them (in the law firm's case, through contingent fees). Allowing those parties to bring collective actions would completely remove the ability of interested claimants to monitor the decisions of the law firms or funding companies and ensure litigation is conducted in the claimants' best interests.

Unlike claimants who bring a lawsuit, who believe they have been injured and entitled to compensation, a law firm or funding company that brings a lawsuit treats it solely as an opportunity to make money. As such, these entities will decide to file cases based upon the present value of their expected return, of which the case's underlying legal merit is not necessarily an element. Indeed, if potential recovery from a lawsuit is sufficiently large, the lawsuit will be an attractive investment, even if the likelihood of actually achieving that recovery is small. Put simply, the present value (excluding inflation and opportunity cost) of a £500 million claim with only a 10% chance of success is still £50 million. For these reasons, the likelihood of lawsuit abuse if law firms and third party funders are permitted to bring collective actions is especially high, and therefore such entities should not be permitted to do so.

It is also noteworthy that the recent introduction of alternative business structures in England and Wales risks blurring the boundary between law firms, representative bodies and third party funders in any case, making this area particularly vulnerable to abuse.

The potential pitfalls of allowing representative bodies which have not suffered harm to bring claims are demonstrated by recent developments in the Netherlands. Dutch law currently allows parties who have allegedly suffered harm to be represented in collective procedures by a foundation ("stichting") or an association ("verenigeng"). This entity need not have any track record to establish that it is suitable to act as a representative. Indeed, it may have been created especially for

the purpose of participating in a collective procedure[38] and, despite the requirement that it be a not-for-profit entity, it may be funded by law firms or third party litigation funders.[39]

In an attempt to regulate these supposedly representative entities, a committee of judges and lawyers published a "Claim Code" as a form of voluntary self-regulation. The Claim Code, which has applied since 1 July 2011, is short (not to say sparse) in terms of content. Although it attempts to limit the possibilities for representative entities to be driven by profit-seeking enterprises, there is little sign that it has succeeded, and it has attracted criticism. From a legal perspective, it has been noted that the Claim Code constitutes guidance only and courts are not bound by it. Nor are there statutory sanctions for non-compliance. With regard to the Code's contents, it has been noted that the Claim Code does not regulate the use of third party litigation funding or require transparency in terms of how representative entities are funded.

Meanwhile, these entities are free to whip up support for costly procedures which, without their interference, might never have been contemplated. This demonstrates that failing to place sufficient restrictions on who may act as a representative body results in the use of collective procedures being driven, whether directly or indirectly, by third parties which have no real interest in the welfare of those they claim to represent. If this pattern were replicated in the UK, it would completely undermine the Government's aim of facilitating redress and growth by empowering businesses and consumers.

ILR therefore recommends that the Government should limit the right to act as a representative to those who have suffered harm themselves. At the very least, the only other bodies which should be able to participate as representatives should be those specified in legislation as suitable to perform that role by satisfying two qualifications: (a) having a track record of acting in the interests of others; and (b) not having a financial motive to commence litigation beyond their desire to obtain redress for those who have allegedly suffered harm.

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

As a preliminary issue, ILR observes that, although the question refers to "ADR in competition private actions," one of the benefits of ADR is that it can prevent legal "actions" from being initiated at all. This is particularly true of consumer ADR ("CADR"), which offers a diverse and expanding range of systems. As Professor Christopher Hodges and others observed:

> *In the context of consumer-to-business (C2B) disputes, dispute resolution takes place within a different architectural structure that is entirely separate from courts. It may be that the dispute could end up being*

[38] In the *Shell* case, for example, a foundation called Shell Reserves Compensation Foundation was set up to represent investors which sought compensation and to distribute settlement amounts to those entitled to it under the terms of the court-approved settlement agreement (see https://www.royaldutchshellsettlement.com/Default.aspx).

[39] See, for example, Stichting Investor Claims Against Fortis, which is funded by a consortium of law firms representing investors for whom it seeks to obtain compensation (see http://www.investorclaimsagainstfortis.com/frequently_question.php).

> *taken to the court process but this rarely happens. The important point is that CADR structures have emerged that operate wholly separately from courts, and process many disputes with no reference to courts.*[40]

The recent work of Professor Hodges and his colleagues at the University of Oxford Centre for Socio-Legal Studies provides an illuminating analysis of the state of CADR in Europe. It focuses on models being operated in areas which are highly relevant to competition-based complaints by consumers; namely, financial services, telecoms, energy and general consumer trading. ILR suggests that the Government should investigate the potential for such models to deal with mass consumer complaints as an alternative to promoting court-based procedures which may be exploited by third parties.

More generally, ILR supports greater use of ADR as a fair and efficient alternative to litigation but agrees that it should not be made mandatory by a government imposed mandate. By and large, ADR is a far superior mechanism for resolving disputes than court-based litigation. ADR is efficient, flexible, and can be tailored to address the specific needs of the parties or the complexities of the case. As a result, ADR tends to be lower cost for all the parties involved. From the point of view of consumers in particular, this makes it a more accessible avenue for resolving disputes. From the point of view of businesses, it often results in less time and expense being incurred than in court-based litigation. Since ADR can be a low-cost and efficient dispute resolution mechanism, it is often less susceptible than court proceedings to abusive practices by parties.

The fundamental difference between an ADR scheme and traditional litigation is that the parties to ADR agree to less formal procedures than would be expected in a court of law. In doing so they achieve certain benefits, including flexibility, efficiency and streamlined dispute resolution. ADR is most successful where the parties maintain control of the dispute resolution process. Thus, the key to a successful ADR regime is that the parties must agree to engage in dispute resolution – and to the form of dispute resolution in which they engage. Of course, what the parties agree to differs based on the type of ADR involved. But even binding arbitration is premised on consent because the parties must agree to be bound by the arbitrator's decision.

It should also be noted that preserving the consensual nature of ADR need not restrict its growth. Parties have plenty of reasons to prefer ADR over traditional litigation; after all, ADR can be flexible, low-cost, quick and tailored to the parties' particular needs. Any expansion of ADR can – and should – result from broader recognition of its inherent benefits, rather than any governmental program that compels parties to use it.

For these reasons, ILR does not support governmental attempts to compel parties to use ADR and agrees with the Government's approach that ADR should be encouraged in competition litigation but not imposed on the parties. ADR works best when the parties control the process and participate by agreement. As further explained in response to question 30, ILR is also concerned that taking companies' use of ADR into account when determining fines against them could put companies under unreasonable pressure to use ADR. In those circumstances, although ADR would remain voluntary in the strict sense, its consensual basis would be undermined if companies were coerced into using it out of fear of receiving more severe penalties.

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[40] Christopher Hodges, Iris Benhöhr and Naomi Creutzfeldt-Banda, *Consumer ADR in Europe: Civil Justice Systems* Beck/Hart, 2012, page xxx.

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) The proposed new fast track regime

As stated in its response to questions 4 and 5, ILR strongly opposes the Government's proposal for a fast track regime. Were such a regime to be implemented, a pre-action protocol would be welcome insofar as it would hopefully encourage SMEs to raise issues of concern with prospective defendants and to consider ADR before commencing proceedings. Possible sanctions for failure to do so might include removal of the costs cap or, if pre-action conduct were considered at the outset, refusal to admit the case to the fast track. For the avoidance of doubt, however, ILR does not consider that such mechanisms would be capable of making up for the shortcomings of the proposal to implement a fast track regime.

(b) Collective actions

As stated in response to questions 9-11, ILR is convinced that it would not be in the interests of the UK or its justice system to extend the current regime of collective actions. As with the proposed new fast track regime, introducing a pre-action protocol for collective actions would be a positive step insofar as it would encourage information exchange and use of ADR, but it would fall far short of addressing the potential abuses described above.

In ILR's view, if such a protocol were introduced it should cover the conduct expected of representative claimants in terms of advertising to potential claimants. It should also require parties to disclose details of their funding arrangements, including the participation of third party litigation funders and/or law firms acting on a contingency fee basis, so as to promote transparency and enable successful defendants to apply for third party costs orders.

In the Consultation, the Government mentions the possibility of courts taking into account whether reasonable attempts were made to use ADR when assessing whether to certify a case as suitable for collective action. Notwithstanding ILR's opposition to collective actions, such a position could be justified to the extent that it required parties to give reasonable consideration to the use of ADR and failure to do so counted against certification. Under no circumstances, however, should failure to pursue ADR count in favor of certification and thereby operate as a sanction against defendants who may have good reasons for deciding that ADR was not appropriate. As stated in response to question 24, ADR works best where it is agreed to by the parties, but it is not appropriate in all cases.

(c) All cases in the CAT

In relation to CAT cases in general, ILR would welcome the introduction of a pre-action protocol subject to the proviso that it only requires parties to give due consideration to ADR rather than expose them to sanctions on account of having chosen not to use it.

ILR would particularly welcome a stipulation that claimants should disclose the existence of funding arrangements with third party litigation funders given their increasing presence in the competition field. Similarly, litigants should be expected to disclose the existence of contingency fee arrangements with lawyers. In both cases, this would promote transparency and put defendants in a

position to apply for third party cost orders if litigation is commenced and the claims against them are unsuccessful.

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

ILR has no specific comments on this proposal. In general, ILR supports measures aimed at promoting settlement provided that these are not coercive.

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

ILR's main contribution to facilitating ADR consists of promoting it as an alternative to litigation through ILR's advocacy work. ILR is disappointed that the Government is not prepared to commit additional public money to ADR despite its clear advantages over litigation and yet is prepared to necessitate new costs for the CAT by extending the UK collective action regime. Nonetheless, ILR has identified a number of proposals relating to private sector funding mechanisms for ADR which should be of interest to the Government.

First, ILR questions whether ADR might in some cases achieve better results if all parties have a financial stake in the proceedings, notwithstanding that the financial risk borne by consumers would necessarily be modest. ILR suggests that the Government should consider the possibility of ADR schemes being funded jointly by the consumers and businesses who utilize them, provided it can be established that the cost to consumers would not render such schemes inaccessible.

Second, in addition to – or as opposed to – asking consumers to pay a fee to utilize an ADR scheme, and as an alternative to utilizing public money, consumer representative organizations could pay fees for consumers who cannot afford to commence ADR proceedings on their own. In such cases, however, the representative organization must have no further interest in the outcome of the case or control over the progress of the case. In particular, the consumer must not be bound to repay the representative organization out of any award to the consumer, because that would give the representative organization a direct financial stake in the outcome of the proceeding.

Third, in adversarial ADR proceedings where it can be established that one party has prevailed, the loser-pays rule should be the starting point for determining who bears the costs of the proceedings. If the parties so agree, liability for costs could be capped according to the value of the dispute, or the rule could be otherwise modified in particular cases. Nonetheless, consumers with meritorious claims would have an incentive to agree to a loser-pays regime because it would eliminate any cost to them of using ADR. At the same time, businesses should support a loser-pays regime because it would reduce the likelihood that any consumer would file a frivolous claim.

In no event, however, should third party litigation funding have any role in ADR schemes. Third party litigation funding encourages the filing of more – often frivolous – suits in the litigation arena, and it would do the same in an ADR scheme as well. Moreover, the use of third party funding in ADR would require consumers to cede control of their cases to a third party whose only interest in the dispute is financial. Encouraging strangers to invest in consumer disputes in the hope of turning a profit is directly contrary to the fundamental goals – and efficiency benefits – of ADR.

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?

ILR is concerned that this question appears to pre-empt the issue of whether a right to bring opt-out collective actions for breaches of competition law should be introduced. In its consultation paper, the Government states that:

> "*the question it must consider is not whether, in the abstract, collective settlement must be desirable, but whether, if a right to bring opt-out collective action[s] for breaches of competition law were introduced … it would be necessary to also introduce separate provisions for collective settlement along the lines of [the Netherlands 2005 Collective Settlement of Mass Damages Act (WCAM 2005)]*."

Only if a decision had already been taken to introduce opt-out collective actions would it be relevant for the Government to consider whether collective settlement would not be needed. As the Government may be aware, for the time being the Netherlands has a procedure for collective settlement but not collective actions for damages. ILR respectfully submits that, while being far from perfect, in this respect the Dutch model is superior to the Government's proposals.

The prospect of a potential damages action operating on an opt-out basis would skew defendants' incentives to settle cases. While the oversight role of the English court in approving collective settlement might, as the Government states, involve assessing the adequacy of the body representing claimants, it would not provide any safeguard against the defendant having effectively been coerced into reaching a settlement.

Notwithstanding this crucial point, the Government should note that, as explained in responses to question 23, the position in the Netherlands regarding the representative entities which seek to negotiate collective settlements should not be replicated in the UK. In particular, the Government should take steps to ensure that, unlike in the Netherlands, such representatives could not be supported by third party litigation funders.

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 merits of the proposal to give the OFT power to impose or certify redress schemes would depend in large part on the detailed provisions by which the proposal might be implemented, and ILR would value the opportunity to provide comments on such provisions. Considering the proposal at a high level, ILR has two main reservations.

First, as stated in response to question 24, ADR mechanisms are most effective when they are agreed to by all parties. On that basis, ILR would not oppose the certification of such schemes by the OFT where they are put in place voluntarily, provided that the criteria for certification were reasonable.

Second, it appears from the Government's consultation paper that consumers would be free to participate in such schemes without being prevented from subsequently commencing proceedings (or possibly being recruited to an opt-out collective action) if they were not satisfied with the

outcome. In such circumstances, ILR submits that the courts should be able to impose a sanction (possibly on the representative claimant) if the outcome of that litigation were not better than that which was available under the scheme.

Notwithstanding these reservations, ILR can see merit in investigating this proposal as an *alternative* to extending the UK collective action regime. This is primarily because it would assist consumers in obtaining redress without the process being driven and exploited by third parties such as third party litigation funders and law firms. If the Government were to extend collective actions despite the dangers inherent in doing so, ILR submits that the Government should consider imposing a moratorium on follow-on actions for a certain time after the OFT issues an infringement decision. This might at least provide companies with time to put in place redress schemes intended to compensate consumers with genuine claims and, significantly, ensure that those consumers would receive redress without the interference of third parties.

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?

ILR submits that, were the Government to implement its proposal to give the OFT power to order a company to implement a redress scheme, the extent to which that company made redress through that scheme should be taken into account when setting its fine. ILR also submits that, if the investigation of individual cases in the context of an OFT-sanctioned redress scheme uncovers only relatively few instances of actual harm, it too should be taken into account when determining the appropriate level for a fine.

If the Government were to introduce opt-out collective actions as proposed, then, notwithstanding that fines and damages should perform different roles, the combined burden upon companies could leave some companies in financial peril. Even without the new wave of private actions that the Government and the European Commission seem determined to promote, the Commission has acknowledged in competition cases that the fines it imposes can, on some occasions, be a fatal blow to the companies fined. In 2008 and 2009, DG Comp received nine inability-to-pay applications following the imposition of competition law fines, pleading that the applicants would be bankrupted if the Commission enforced the fines imposed. In 2010, 32 out of the 69 companies fined submitted inability-to-pay applications. DG Comp reduced the fines for nine of those companies. As Commissioner Almunia has stated, "*our fines must remain large, because companies need to understand that cartels do not pay. But at the same time my objective is not to put companies out of business.*"[41] In the current economic climate, taking redress into account when setting fines would be a sensible way of facilitating redress without reducing the deterrent effect of the fines.

An alternative proposal, which would have the added benefit of preventing follow-on actions from being exploited by profit-seeking third parties, would be to compensate individuals with valid claims out of the fines collected by competition authorities. One possible model for making fines available for redistribution is the U.S. SEC's Fair Funds mechanism, which is described in response to question 22. ILR respectfully submits that the Government should study such possibilities before

[41] SPEECH/11/268 - Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, *Cartels: the priority in competition enforcement*, 15th International Conference on Competition: A Spotlight on Cartel Prosecution, Berlin (14 April 2011).

taking steps to promote the use of litigation, and particularly collective litigation as a means of enforcing competition law.

Outside of the context of companies making redress via OFT-sanctioned schemes, however, ILR is concerned that taking into account payment of compensation when imposing fines could place companies under pressure to settle claims for compensation which they might otherwise have been able to defend.

As the Government itself recognizes, quantifying the effects of anti-competitive behavior can be a difficult and complex exercise. A company which legitimately chooses to focus on maintaining its rights of defense in response to an objection from the OFT will not necessarily be in a position to engage in that exercise and pay compensation ahead of a fine being imposed. ILR therefore calls into question whether this kind of procedure would be workable under the current competition regime.

It should also be taken into account that once it is publicly known that a company is under investigation for alleged anti-competitive behavior it will quickly become a target for claims. Neither the opening of an investigation nor the finding of an infringement implies that all claims are meritorious. Damage, causation and quantum must still be established. There is a danger that taking redress into account when setting fines would result in companies being coerced into paying such claims to try to contain fines, and thereby lead to cases of unjust enrichment.

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

ILR believes that the enforcement of competition law is properly the responsibility of public enforcement authorities. Private actions serve a different purpose: to compensate those who have genuinely suffered harm. While the possibility of private actions is bound also to have a deterrent effect, seeking to harness this effect by making it easier to claim damages will lead to abuse and unjust enrichment. ILR respectfully submits that the Government's focus should be on maintaining the good reputation of its public enforcement system and that there are more appropriate means of ensuring those harmed by unlawful conduct are compensated than promoting private actions.

Public enforcement necessarily involves policy judgments by the authority bringing the enforcement action. A claimant who has a personal monetary stake in a case is ill-suited to making these policy judgments, as the U.S. class action experience has amply demonstrated. Although plaintiffs frequently couch their suits as seeking injunctive relief, there is inevitably a monetary component, and the suits are almost always driven by the prospect of lawyers' fees rather than justice for consumers. It is for this reason that it is imperative that private bodies not be permitted to commence opt-out collective actions (see question 22). Accordingly, to the extent the Government believes public enforcement of competition law should do more to protect consumers and businesses from anti-competitive conduct, the correct response is to augment the public enforcement authorities rather than to delegate their powers to private parties whose primary motivation in most cases will be to obtain a financial award or settlement.

In addition to punishing wrongdoing, public enforcement can also be an effective means to provide compensation to victims of unlawful activity. This is demonstrated by the Fair Funds mechanism operated by the SEC which is described in response to question 22, above. ILR respectfully submits

that the Government should consider whether a scheme similar to the Fair Funds mechanism might help to achieve the dual aims of public enforcement and compensation. More specifically, studying this possibility before taking steps to expand the UK's collective action regime may enable the UK to avoid the problems inherent in collective litigation.

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?

ILR agrees that, given the importance of leniency programmers for detecting cartels, leniency documents should be protected from disclosure. ILR is also cognizant of the fact that, following the judgment of the Court of Justice of the European Union in *Pfleiderer*,[42] there may be the potential for national courts to take divergent approaches to the protection of leniency documents. This could in turn create a further incentive for forum shopping, with claimants attempting to bring their claims in the courts most likely to grant them disclosure of leniency documents and related material.

For the time being, however, it appears that fears about how national courts might apply the *Pfleiderer* judgment may have been misplaced. The German court from which *Plfeiderer* was referred, for example, ultimately refused to grant disclosure of the leniency documents sought in the case. More recently in England and Wales, in the *NGET* case, the extent of the disclosure ordered in respect to material prepared for the purposes of a leniency application fell short of what was sought by the claimant in the wake of the *Pfleiderer* judgment.[43] This was despite the perception that the English approach to disclosure is more liberal than elsewhere in the EU and the fact that Mr. Justice Roth did not agree with all of the points made by the European Commission in its written observations in that case.

In light of these developments, ILR submits that the most appropriate course of action is to wait to see how the case law on disclosure of leniency documents evolves at both national and EU level. ILR is not convinced that legislation on this issue is required at the present time.

Were the Government minded to issue guidance on which documents the English courts should seek to protect in private actions, ILR would support the Government's proposal to protect documents created for the purpose of a leniency application. Presumably this would also include material from those documents where it appears in other documents.

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?

As noted throughout this response, ILR believes that competition enforcement should be a matter for public enforcement authorities and, rather than promote or extend the use of collective litigation, the Government should investigate other possibilities such as empowering competition authorities to provide redress to consumers through a combined enforcement/compensation mechanism (like the SEC's Fair Fund). Such a framework would obviate the need to exempt whistleblowers from future liability in collective actions, because the infringer's compensation of

42 Case C-360/09 *Pfleiderer* [2011] 5 CMLR 219.

43 *National Grid Electricity Transmission plc v ABB Power Ltd and ors* [2012] EWHC 869 (Ch).

injured consumers, which otherwise would be the subject of the follow-on collective action, would instead be addressed as part of the competition authority's enforcement mechanism.

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.

ILR has no further comments on other measures which should be taken to protect the public enforcement regime. As stated above, ILR believes that the Government should look to achieve its policy objectives by augmenting the public enforcement regime rather than seeking to promote private actions. A further benefit of taking that approach is that it would, to some extent, lessen the threat posed to the public enforcement regime by private actions.

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

As indicated at other points in its response to this consultation, one of ILR's key concerns is forum shopping, i.e., the practice of claimants selecting particular jurisdictions in which to bring claims on the basis of perceived advantages afforded to them by the rules of that jurisdiction.

In the U.S., claimants' ability to shop for the most claimant-friendly forums in which to bring lawsuits has led to an increased volume of litigation in jurisdictions with reputations for being anti-defendant. Prior to the enactment of federal class action reform legislation, this problem led to the creation of "magnet" jurisdictions – otherwise unremarkable rural counties that became magnets for hundreds of class action lawsuits because the courts consistently handed down claimant-friendly rulings.

The U.S. experience demonstrates that the existence of such forums engenders great expense and inefficiency. But what is even more troubling is that forum shopping can distort the application of law by promising claimants better results if they manipulate their claims so that they can appear in "friendly" courts.

England and Wales is already a popular jurisdiction among claimants in competition cases, as demonstrated by a number of well known disputes in the English courts over jurisdictional issues.[44] ILR is concerned that certain of the Government's proposed reforms may enhance the perception of England and Wales as a "claimant-friendly" jurisdiction for private competition actions and attract third parties from across the European Union which seek to promote litigation as an investment opportunity. While this prospect might be attractive to UK-based legal services firms, the Government should also consider it from the point of view of those looking to carry on business in the UK.

The Government will no doubt be aware that the European Commission has for some time been contemplating a proposal on collective redress. It will also be aware of reports that DG Competition intends to propose legislation on private competition actions, possibly including provisions on collective claims. ILR is strongly opposed to action on collective redress at EU level

[44] *Provimi v Aventis* [2003] EWHC 961 (Comm); *Cooper Tire and Rubber Company v Dow Deutschland Inc* [2010] EWCA Civ 864; and *Toshiba Carrier U.K. Ltd v KME Yorkshire* [2011] EWHC 2665 (Ch). The *Toshiba* is the subject of a pending appeal.

and is far from convinced of the need for EU legislation on private competition actions. ILR respectfully submits, however, that to avoid creating new disparities between England and Wales and other EU jurisdictions which could fuel forum shopping, the Government should consider postponing its consideration of these proposals until there is greater clarity at EU level.

Welfare Rights and Money Advice Service

I am responding to just 2 of the questions;

Q.20 What are the relative merits of paying any unclaimed sums to a single specified body, when compared to the other options for distributing unclaimed sums.
Simplicity, clarity and equity- ensures that all sums illegitimately gained can be best used.

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, it would be most appropriate; essential that the body is independent, has remit & record of appropriate use of funds to enable advice services to assist vulnerable groups.

Yours sincerely,

Ruth Frost
Manager
Welfare Rights and Money Advice Service (AC) P.O. Box 595 Bristol
BS99 2AW
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BCC/Neighbourhoods and City Development/Strategic Housing/Housing Solutions

Which?

Which?, 2 Marylebone Road, London, NW1 4DF
Date: - 24th July 2012
To: - BIS, Response by: - 'Pula Houghton, Director of Public Policy and Consumer

Consultation Response

Tony Monblat
Consumer and Competition Policy
Department of Business, Innovation and Skills
3rd Floor, Orchard 2
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Private Actions in Competition Law: A Consultation on Options for Reform

Which? is an independent, not-for-profit consumer organisation with around 1.3 million subscriptions and is the largest consumer organisation in Europe. Which? is independent of Government and industry, and is funded through the sale of Which? consumer magazines, online services and books. Which?'s mission is to make individuals as powerful as the organisations they have to deal with in their daily lives by empowering them to make informed decisions and by campaigning to make people's lives fairer, simpler and safer.

Summary

We welcome this consultation on reforms to the system for private actions in competition law. In particular, we welcome the proposed changes to the way in which collective redress could operate. The activities of cartels, and abuse by dominant firms, have the potential to leave consumers and other businesses significantly out of pocket. At present there is frequently a strong regulatory response, including the levying of significant fines. However, this is only part of the solution. Compensating the victims of cartels should be an integral part of the response. Unfortunately, the current system is inadequate with the consequence that although the regime has been in place for 10 years, it has not been widely used. This means that currently, there is no effective way for large groups of consumers to obtain redress even where it is clear that collectively they suffered a significant financial loss.

In our own market research, we found that if there was a collective redress mechanism that allowed consumers to band together to bring a low value claim (for example an energy supplier overcharging consumers by £5 to £10 per year), 85% of those who would normally take some form of action would be likely to consider joining a 'group action', while for a high value claim (e.g. an airline not being willing to pay compensation of around £250), 88% of those of those would normally take some form of action would be likely to consider joining a

'group action'.[1]

As such, we agree that the focus now should be on reforming the system such that the consumers and businesses affected are able to obtain redress in a manner that is fair, quick, low cost and efficient. Such reform could have a hugely positive impact but only if such a system could operate, where appropriate, on an opt-out basis with the distribution of uncollected damages being done on a cy-pres basis. We query whether the Government is placing too much emphasis on consumers and businesses being able to bring cases themselves, and would instead support a wider range of responses, including the OFT seeking redress on the part of consumers as part of its standard enforcement function; collective follow-on actions will remain the most feasible action but at present the time between abuse and redress can be significant. There appears to us to be significant merit in ensuring that the up-front regulatory response is sufficiently strong to incentivise defendants to try and find a workable solution (such as ADR) before collective redress is even needed.

From our perspective, there is no reason why the same regime needs to be applied to stand alone and follow on actions. Nor why the same regimes should apply to business claims as well as to consumer claims. For example, it might be appropriate for different funding mechanisms to apply to each type of case. Alternatively, different procedural rules may be needed, for example due to the different roles certain issues play in each case – such as the passing on defence, risk of sharing information, the presumption of loss etc.

We would also suggest that consumer follow on claims are, on the whole, far simpler in nature than stand-alone cases or B2B follow on claims and therefore there is a need to ensure the greater complexities of these other cases do not delay or derail the much needed reform in relation to consumer follow-on cases.

Comments in response to key questions

Chapter 4: The Role of the Competition Appeals Tribunal

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?

[1] Which? (March 2011) online omnibus survey

We do not have extensive comments to make on this part of Chapter 4, however we are broadly supportive of the overall thrust of these proposals. In particular we agree that a party should not be prevented from bringing before the CAT just because their case includes some minor elements of a stand alone nature in what is otherwise quite clearly a follow-on claim. Any changes that make it easier for businesses to bring their own cases where anti-competitive behaviour exists are likely to be a good thing in terms of deterrence.

If the CAT is to be able to hear stand-alone cases as well as follow on claims, this should apply equally to consumer and business standalone actions. Provision should also be made to enable to the High Court to transfer any competition based proceedings to the CAT, particularly where there is scope to join those with a related case already underway in the CAT. Finally, if a fast-track system is to be introduced into the CAT, we do not see any reason why it should be limited to SME cases. In fact, a fast track regime is most suited to simpler cases, which may include SME and consumer standalone cases but also, more importantly collective follow on cases, especially those brought on behalf of consumers.

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

We are supportive of this proposal. We have not done the modelling to comment on whether 20% is an appropriate starting point, but the Consultation Paper seems to suggest it is at the lower end of likely losses. If this is the case, we question whether a higher presumption should be applied – otherwise, where a higher loss has occurred, there will be a significant disincentive for cartelists to engage in meaningful disclosure. This presumption should help address the imbalance of knowledge between the cartelists (who know what the impact of the cartel was and generally how much people have overpaid as a result) and the victims and their representatives. This would be particularly important for – and help facilitate - any early settlement discussions.

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 support the need to address this issue because most cartels happen upstream yet most costs are passed through to end customers. This is particularly the case in the context of consumer goods where a cartel existed amongst key component manufacturer. For example, in the recent cases involving car glass, LCD panels (used in TVs) and computer chips, it seems quite reasonable to assume the increased component costs due to the cartel would be passed on to the end user in their entirety. At present, without a clear position on the pass-through defence, cases where consumers are indirect purchasers can be more complex and time consuming – and so, less attractive - to bring. Also, there is scope for the cases to be significantly hindered by decisions in separate claims by the intermediaries. As such, we would support a rebuttable presumption in favour of the pass through defence, particularly where a cartel impacts any of the core components of a consumer good. There is also scope to clarify that where a cartelist has argued passing on they should be estopped from arguing the opposite in a consumer claim.

Chapter 5: Collective Actions

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

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

In 2007 Which? took a collective action on competition infringements against JJB Sports in relation to price fixing of certain football shirts in 2001. Which? settled the case and was able to provide compensation for those consumers that had been victims of the infringement. This provided us with first-hand experience of the practical issues that can act as obstacles and enables us to outline what kind of collective redress works best.

Our experience showed that the existing opt-in basis for actions led to low levels of consumer taken up due to a number of practical issues:

- **Finding and recruiting claimants** (especially difficult with passage of time and low value claims)
- **Evidence of eligibility** (are receipts enough or do you need a statement of eligibility? The passage of time has an important bearing on the significance of this issue)
- **Obtaining sufficient disclosure** (with a limited number of participants, there is little incentive for the cartelist to engage at an early stage and provide full disclosure. This make it particularly hard to:
    - **Work out the total overcharge/loss**
    - **Encourage early and meaningful settlement discussions**
    - Have enough information to assess what is a fair settlement (how do you collect sufficient information to determine what constitutes a fair level of compensation?)

These issues required a considerable amount of time and resources to solve - a point well worth noting given industry fears that collective redress will lead to a tide of court cases. In the JJB case relatively few of the potential millions who suffered loss benefitted from the settlement, which meant, in effect it allowed the company to get away with their illegal gains.

Our conclusions from this experience are that the system should be changed to one based on three core principles:

1 The system must be ‘opt-out’
2 A ‘cy pres’ system of damages is needed
3 Representative bodies should be limited to designated bodies

In terms of policy objectives for the system as a whole, the proposals sound like the right ones, although from our perspective the priority is very much around redress. However, we note that a move to an opt-out system is by far the most critical aspect: in the absence of such a change, the other elements are of significantly less importance.

One further point we would make in response to the statements here is that in our view there is a case, in time, for considering an extension of the collective action power to a wider set of circumstances than simply competition cases. In particular, we are strongly supportive of introducing measures into the Financial Services Bill that allow collective proceedings to be brought on behalf of a group of financial services claims that share the same, similar or related issues of fact or law.

In the past ten years we have seen substantial detriment caused to consumers in a number of areas including mortgage endowments and Payment Protection Insurance. The impact of these problems on consumers has been compounded by the slow response of the industry and regulators. Excessively long timescales, poor complaints handling and inadequate redress have become all too common. Consumers are finding they need to progress their complaint all the way to the Financial Ombudsman in order to be guaranteed a fair hearing. It is clear that in cases of systemic mis-selling, representative collective action can offer a better resolution to consumer detriment.

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

We are equally supportive of these proposals being given to consumers and businesses, but believe for both, the ability to bring such cases is limited to appropriate representative bodies.

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

No comment

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

We have no reason to suggest collective actions shouldn't be allowed in stand alone cases as well as follow on cases. That said, it is important to acknowledge that in practice they are likely to be a lot less attractive than follow on cases as there is significantly more risk associated with them. In practice, actions can be limited by the bottleneck created by the public enforcement regime – and the issues this brings with it such as consumers not retaining evidence.

To the extent the Government maintains a distinction between follow on and standalone cases, we think it necessary to ensure that a collective action before the CAT should not be prevented just because their case includes some minor elements of a stand alone nature in what is otherwise quite clearly a follow-on claim.

There is a need to think about the interaction between a collective standalone action and the OFT enforcement regime. If the OFT is already investigating a case behind the scenes, we would assume that it would be unhelpful for Which? to launch a claim in the High Court at the same time. To get round this problem, we would rely on the defendants informing us as part of the pre-action disclosure/negotiations.

We would suggest that the risk of 'fishing expeditions' (para 5.11) is extremely low if the regime is properly set up i.e maintenance of the 'loser pays principle and with actions limited to appropriate bodies.

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 a result of the practical problems outlined above in the answer to question 9, we have a very strong preference for an opt-out system. For competition law breaches, individual damages may be low on an individual basis but the numbers of consumers affected are huge. For these reasons, while we are happy in principle for the CAT to have discretion, there should be – at least for consumer follow on claims – a presumption in favour of an opt out regime. If the CAT is to retain discretion, the costs regime will need to carefully deal with the situation where significant time and resources are spent on the genuine belief the claim was suitable as an opt-out but later designated an opt-in claim by the CAT.

Which?'s experiences have shown that consumers rarely participate in litigation at the outset – they are far more comfortable with joining in a claim once the outcome is certain and they perceive no risk as to costs etc. Without an opt-out provision, representative bodies will never know at the outset whether it is worthwhile for them to take action. No reputable representative body will want to champion a claim where few consumers engage either directly or indirectly. This may result in large numbers of claims worth significant sums simply not being brought. Without an opt-out provision, the redress system will be very similar to the current situation which we believe to be a wholly inadequate mechanism for obtaining redress for the large number of consumers affected by competition law infringements.

Which? recognises that collective redress proposals are a significant and major development in access to justice. Concerns have been raised in the past that an opt-out process would lead to the development of a US style class action culture in the UK. However there are a number of measures in place that will prevent this from happening.

1) Judicial supervision
Which? believes it is the particular features of the American legal system, rather than the nature of the opt-out system per se, that have led to the class action culture. Opt-out is a feature of collective redress systems in Portugal and Scandinavia but these countries have not experienced the same problems as the US. In contrast to the US, our legal system is characterised by close judicial supervision. Judges actively manage cases and will require parties to use another avenue of redress if this appears more appropriate, preventing the pursuance of unreasonable claims. The proposals build on our tradition of active management by ensuring judicial checks and balances.

2) The "loser pays" principle
The application of the "loser pays" to opt-out cases will be a hugely effective deterrent to speculative claims and will be the biggest factor that prevents the system being hijacked and abused. The threat of being exposed to considerable costs orders should a claim fail, which could run into tens of millions of pounds, should be a sufficient deterrent against claims being made that are without foundation or of little merit. The costs of losing are far too high for the process to be considered an attractive option for these seeking to generate publicity or air grievances.

3) Restricting action to representative bodies
Careful drafting of the qualifying criteria for representative bodies should prevent ad hoc bodies being formed by groups seeking to benefit solely from providing professional services. Ideally, opt-out collective actions should be brought by independent charities which have many years experience in representing consumers and which have sufficient knowledge and understanding of litigation to ensure efficient, cost-effective and proportionate management and decision making in such cases.

We can not see any real benefits in the pre-damages opt-in suggestion and in fact believe it would represent a significant step backwards in terms of implementing an effective collective redress regime. In reality, this seems to be the worst of all worlds: combining the practical barriers presented by an opt-in regime (e.g. the need to advertise up front and get people involved early; lack of early disclosure etc.) while also preventing anyone who didn't hear about the action from taking their own action. This is of particular concern in relation to early settlements where we see absolutely no benefit of the pre-damages opt-in regime.

Q. 15-21 – see below.

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

We agree that the ability to bring opt-out collective actions for breaches should be granted to private bodies, rather than just granting it to the competition authority. However, we would be supportive of public bodies being involved as an additional option. As such, the door should be left open for such actions in case the right opportunity arises. Private and public actions should be possible.

Our concern about exclusively giving public authorities the right to bring actions is that this could create an unwelcome bottleneck. There is a potential conflict with their primary role and the additional pull on their budget could lead to fewer cases being brought and so less deterrence.

Our preference would be to give the OFT discretion to provide redress as part of their enforcement process rather than in addition to it. In situations where the OFT is not seeking redress for consumers, it should be facilitating cases by those that are. This will likely need a statutory duty to assist and a clear exemption from statutory non-disclosure obligations. This would help representative bodies identify legitimate collective redress claims and be prepared to lodge a claim early or negotiate a redress promptly.

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 consider it necessary to have a slightly wider designation than just Which?, as it is at present. In widening this designation, it will be important to have some restrictions to protect the integrity of the regime. Our preference would be for this power to be strictly limited to recognised representatives and we would suggest that these should fall into two categories. There should be a limited number of organisations that have a broad representative scope that are approved in advance. There could then be a separate mechanism whereby other

bodies could be approved by the courts for particular actions if the people they represent are specifically affected.

One important consideration in this latter case would be to ensure that the mechanism happened early enough in the process to ensure that the potential representative body knew early on that they could bring the case. It would be important to avoid a situation whereby their standing was challenged after they'd incurred lots of time and expense bringing the case.

Chapter 6: Encouraging Alternative Dispute Resolution

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.

There will always be a natural incentive to settle collective actions, especially by a representative body such as ourselves, in order to avoid costs and time. As such, we would consider enabling ADR to be a good thing. We would not go as far as to make this compulsory but would strongly encourage its use wherever possible.

To make this work successfully, provision is needed for proper disclosure, so the representative body 'has something to negotiate with' and any out of court settlement occurs at the right level. We would be supportive of settlements being court approved. We also support the use of pre-action protocols, providing they adequately deal with disclosure.

However, if the use of ADR and pre-action protocols is to be successful, the Government will need to consider how to address the risk posed by the use of 'Italian Torpedoes'. This is a well known litigation tactic – particularly in competition claims – whereby anticipated (but not yet commenced) litigation in one jurisdiction can be delayed by initiating related proceedings in another, slower jurisdiction. This will not be relevant to all cartels, but is a risk where affected businesses and consumers exist in a number of different Member States. Which? is concerned the use of pre-action protocols or approach regarding ADR before proceedings have been initiated will act as a signal and may encourage the cartelist to initiate proceedings elsewhere in Europe (e.g. against a fellow cartelist to address issues of liability as between the two parties).

We also doubt whether the introduction of formal settlement offers is desirable in the context of competition redress actions. In general civil litigation, it is normally the case that the claimant has a clear understanding of the loss it has suffered. This is very rarely the case in a competition redress action given the information asymmetries previously mentioned. As a result, we believe the risk of an adverse costs ruling would, in practice, facilitate a strong bias in favour of claimants settling for significantly less than they should.

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?

If the ability to enter into collective settlements was to be introduced, we believe an important aspect of that system would be judicial oversight of any agreed settlement (particularly given the issues with proper disclosure). Accordingly, providing an effective opt-out system is introduced, we believe the need for and benefits of a collective settlement regime to be limited. That said, a collective settlement regime would mean less legal costs given those associated with commencing proceedings would be averted.

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?

We would be supportive of a regime in which the OFT see obtaining redress as part of their enforcement process. Given that they are already investigating, and have the ability to compel the provision of information, this seems an efficient way for consumers to obtain redress. However, any such regime should include the ability for the OFT to impose a system of redress on the cartelists. If the OFT does not have 'a stick' through which it can encourage a voluntary redress mechanism, we believe it's ability to obtain adequate redress could be severely limited.

We also agree with the concerns and views set out in paragraph 6.32, which seems to move things in the general direction of the current Financial Services Authority regime. Our one reservation concerns the suggestion in paragraph 6.39 that the 'OFT will direct the business how to make the redress rather than facilitate it themselves'. If this is to be the case, there needs to be proper oversight of the process, including, potentially, consultation with appropriate bodies. We would also suggest that the OFT publish its recommendations so customers and advisers know what can be expected. In particular, we would want to know what the OFT would do to help others bring a redress claim in the event they decide not to. Also, there should be a clear statutory provision that permits others to bring a redress action in the event the OFT decided not to.

In terms of fines, we agree that there should be no immunity from a financial penalty if you set up a redress mechanism. However, we do think there is some scope for there to be a slight reduction in the fine, in appropriate circumstances, in recognition of the co-operation. We believe an effective opt-out system should provide an adequate incentive for a cartelist to enter into a voluntary redress scheme: if a significant damages claim is a realistic possibility, there should be significant benefits to the company in terms of time and costs to settle early as part of the enforcement process and avoid a later court case. A similarly incentive would also arise if the OFT has the ability to impose a redress mechanism on a cartelist. We therefore agree with the conclusions set out in paragraph 6.46.

Chapter 7: Complementing the Public Enforcement Regime

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.

We recognise the risk that collective redress could have a chilling effect on leniency applications, as this will mean the effective penalty for a transgression will increase. However, at the same time we would still maintain that leniency applicants should be subject to collective redress. That said we would be supportive of the idea that some leniency applicants could be given protection from the joint and several liability that currently applies to all cartelists. Our preference is that it should only be given for the first applicant. This gives a greater incentive to be 'first in' and, given we understand that in practice the most valuable information is provided by the immunity applicant, we believe the overall impact on the leniency regime should be limited. We would also support a proposal where – as in the US – immunity from joint and several liability is only granted where a whistleblower proactively co-operates with a representative body bringing a redress claim.

We would agree that, in principle, leniency documents should be kept confidential because they are clearly self-incriminatory. However, if confidentiality is to be maintained, steps must be taken to ensure leniency applicants do not start putting more and more information into them in order to prevent the OFT from using it in relation to any redress they might seek to organise. In this regard, paragraph 7.6 draws distinctions between documents and we would suggest that the distinction should really be between types of information. Information relating to liability should be protected and that related to redress or the quantum of loss should not.

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

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

We do not consider this to be a necessary proposal to the extent a claim is brought by a pre-agreed representative body. This is particularly true if the action is a follow-on claim. Otherwise, this is fine in principle as long as the content is used in this limited way.

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

We do not consider treble or punitive damages to be necessary, particularly in the context of follow on cases.

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?

We are supportive of keeping the loser pays principle for collective actions. This is an important way of ensuring that we do not move to the sort of US style class action system that is often raised as a concern. We would not see many instances in which there is a need for court discretion, as discussed in para A.12, but we would support the scope for some flexibility just in case.

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

We do not see a significant need for contingency fees. However, we recognise the changes anticipated by the Legal Aid, Sentencing and Prosecution of Offenders Act and do not see why competition cases should be treated any differently.

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?

We are supportive of a system whereby unclaimed sums are distributed for wider public benefit rather than returning such amounts to the cartelist. This would mean that, regardless of the number of consumers that ultimately participate in the claim, the cartelist would not benefit from its illegal actions. Not only does this appear to be the most appropriate outcome from a public policy perspective, but such an approach would, we believe, also help to promote the early resolution of claims. If the unclaimed sums are distributed appropriately, it would also mean that even though some affected claimants have not directly benefited from the action, they are likely to derive an indirect benefit.

We are also supportive of a system whereby the unclaimed sums are distributed to a single specified body, rather than through a traditional cy-pres distribution model, largely due to the simplicity of such a regime. However, we are unconvinced the current proposal for use by the Access to Justice Foundation is the most appropriate use of these funds. While the stated purposes of the Foundation are laudable, we are concerned this fund could, in practice become a variant of option (b) (escheat to the Treasury). Instead, we would prefer to see a much closer nexus between the cases giving rise to these unclaimed sums and the ultimate use to which those funds are put, and would suggest they are used – at least primarily - for the purpose of consumer protection and redress.

Irrespective of the specified body or the general purpose for which the funds are used, proper oversight of the use of the unclaimed funds is essential. Such oversight will need to ensure the general purpose(s) remain appropriate, there is a sensible balance between the short and long term objectives, and that individual applications to the fund are properly considered. While we have no firm view as to the precise form such oversight should take, we believe such oversight will necessarily involve close co-operation with relevant external parties and representative bodies.

Which? would like to play an active role in helping to determine how the unclaimed sums resulting from future collective redress actions are used. We would welcome the opportunity to discuss these further with Government.

Which? July 2012

Wiltshire Law Centre

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): **Wiltshire Law Centre**

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

Consultation questions

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

We think there is significant merit in paying the unclaimed sums to a single specified body set in statute, for the following reasons:

- It would avoid the problem of trying to find a suitable recipient for each case, and the associated lobbying of judges and potential satellite litigation.
- The named charity would receive funds in the public interest and would retain its independence having not been involved in the litigation.
- This would fully deter anti-competitive companies as culpable parties would have to compensate for the total amount of harm as decided by the court, regardless of the number of individuals who came forward to collect their damages.
- The single recipient would receive and use the funds solely in the public interest, acting independently from the parties, their lawyers and the litigation.
- This would preserve legal certainty for all parties and the court, before and during litigation.
- This solution would be administratively simple, saving parties and the court time and costs and thus maximising the funds available from such actions.

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

We consider the Access to Justice Foundation as the most appropriate recipient for two main reasons:

The Access to Justice Foundation (AJF) is a trusted national grant maker

- AJF is an independent charity, acting in the public interest to improve access to justice.
- AJF has a trusted role in the advice sector and legal profession, who worked together to establish it.
- AJF'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 advice and pro bono sector to help organisations across England and Wales.
- AJF is able to be uniquely strategic in distributing funds, working with local, regional and national organisations to take account of needs 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.

The Access to Justice Foundation (AJF) supports 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 makes sense that residue damages be used to support further access to justice for the public.
- The advice sector and pro bono sector have an increasingly vital role in providing free legal assistance to those not currently empowered by the law, whether through poverty, social exclusion, or lack of education – just at the time when their abilities are severely impacted by funding cuts.
- 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

Q. 35 Do you have any other comments that might aid the consultation process as a whole?
Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Withy King LLP

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

LLST views the merits of paying unclaimed sums to a single specified body as significant.
A single destination that is set out in statute would be beneficial because:

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

- The named charity would receive funds in the public interest and would retain its independence having not been involved in the litigation.
- A full deterrent effect against anti-competitive companies is achieved as companies practising such behaviour will need to compensate the total amount of harm the court decided was suffered by individuals from their anti-competitive action, regardless of the number of individuals who came forward to collect their damages.

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

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

LLST views the disadvantages of the other possible options as being:

Cy-près

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

- Of the two major options for 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?

LLST views the Access to Justice Foundation as the most appropriate recipient for two main reasons:

1. Support for access to justice

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

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

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

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

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

2. The Foundation is a trusted national grant maker

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

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

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

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

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

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

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

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Zacchaeus trust

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

Response from Zacchaeus 2000 Trust , 34 Grosvenor Gardens SW1W 0DH

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.

Paying unclaimed sums to a single specified body would be preferable
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.

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The disadvantages of the other possible options are:

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

- Of the two major options for c*y-près*, the “price roll-back” might well not benefit the previous customers harmed. Also, this might give the (anti-competitive) company an advantage over its competitors.

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Z2K views 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.

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