

## **Opt-out collective actions regime review: call for evidence**

### **Response from the Competition and Markets Authority**

#### **Introduction**

1. The CMA is the UK's principal competition and consumer authority. It is an independent non-ministerial government department and its responsibilities include carrying out investigations into mergers and markets and enforcing competition and consumer law. The CMA helps people, businesses and the UK economy by promoting competitive markets and tackling unfair behaviour.<sup>1</sup>
2. The CMA has a role in providing information and advice to government and public authorities.<sup>2</sup> The CMA's advice and recommendations are made with a view to ensuring that policy decisions take account of the impacts on competition and consumers.
3. The CMA welcomes the Department for Business and Trade's (DBT's) review of the opt-out collective actions regime for a variety of reasons.<sup>3</sup>
4. The CMA has a central interest in ensuring that the enforcement regime as a whole works effectively to deter anti-competitive conduct, to hold to account those parties who breach the law and to ensure that those parties who suffer loss as a result of such conduct can obtain redress. Private enforcement, whilst aimed at compensating those harmed from breaches of competition law, can also enhance deterrence and accountability by increasing the breadth of cases where enforcement activity of some kind is pursued. This is important as the CMA has finite resources and, therefore, needs to prioritise cases that it believes will generate the most impact and carry the greatest strategic significance in terms of the benefits that are expected to be felt by people, businesses and the UK economy. The CMA also supports the basic

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<sup>1</sup> The CMA's statutory duty is to promote competition, both within and outside the UK, for the benefit of consumers.

<sup>2</sup> Under Section 7(1) of the Enterprise Act 2002, the CMA has a function of making proposals, or giving information and advice, "on matters relating to any of its functions to any Minister of the Crown or other public authority (including proposals, information or advice as to any aspect of the law or a proposed change in the law)."

<sup>3</sup> [Opt-out collective actions regime review: call for evidence](#).

principle underlying private enforcement that those who suffer harm from breaches of competition law should be able to obtain effective redress. It follows that public and private enforcement are both important parts of the UK's single overall competition law regime. When they work well together the effectiveness of the regime as a whole is maximised.

5. However, as noted in the Call for Evidence, private litigation and, in particular, collective actions under the opt-out regime, can be lengthy and costly due to their complexity and the chances of a successful outcome for consumers are often highly uncertain. Furthermore, the significant growth in opt-out claims since 2015 also has wider implications for the overall balance of resources across the wider competition enforcement landscape as a whole by increasing demand for specialist legal, economics and other advisors and experts and the caseload of the Competition Appeal Tribunal (CAT). Therefore, the CMA agrees with DBT on the need to consider carefully the impact and operation of the opt-out regime and is pleased to contribute to DBT's Call for Evidence.
6. The CMA's response focuses in particular on the questions posed in the Call for Evidence that are of direct relevance to the CMA.

***Question 10: What approach should be taken if the same issues are concurrently being investigated by the CMA and brought before the CAT?***

7. Where the CAT (or, in some cases, the High Court) has before it a Competition Act 1998 (CA98) claim which is the same or closely related to a matter under investigation by the CMA in ongoing public enforcement of the CA98, this can raise certain risks for the CMA's public enforcement, including the possibility that the CAT/High Court will come to consider the merits of a private action before, or around the same time as, the CMA issuing a decision on similar or related issues. This could lead to the potential for diverging positions, and the inefficient and duplicative use of public resources.
8. These risks can be mitigated to some extent by the CAT/High Court through exercise of their case management powers which include the ability to order a stay of the proceedings before it (whether on application by one of the parties, the CMA, or upon the CAT/High Court's own initiative). Doing so may, in the CMA's view, be appropriate in various circumstances, and particularly where the CMA's investigation under the CA98 is at a late stage, and where a time-limited stay of the private proceedings might reduce the risk of inconsistent decisions and the inefficient and duplicative use of public resources. The CMA however considers this issue to be highly fact sensitive.

***Q12. Are there circumstances where it would be appropriate to provide protection to businesses from liability? For example, might this be a consideration in certain circumstances in which businesses have cooperated with the CMA in a prior investigation?***

9. In the context of public enforcement, businesses which are or have been involved in a cartel may co-operate with the CMA by providing information about its operation under the CMA's leniency policy.<sup>4</sup>
10. The CMA's leniency policy plays an important role in the CMA's strategy to deter anti-competitive conduct by supporting and facilitating the effective detection and enforcement of cartel activity. In addition to helping to uncover cartels that might otherwise go undetected (given that, by their very nature, cartels are generally conducted in secret), the policy encourages firms that have been involved in wrongdoing to provide first-hand direct evidence and to cooperate proactively with the CMA. This enables the CMA to act against anti-competitive activity more efficiently, thereby deterring anti-competitive conduct, in the public interest. In return, businesses that are granted leniency may benefit from immunity from, or a reduction in, financial penalties.<sup>5</sup> Similarly, cooperating individuals may receive immunity from criminal prosecution and/or protection from director disqualification proceedings.<sup>6</sup>
11. The CMA recognises that possible exposure to private damages actions may be an important consideration for prospective leniency applicants.<sup>7</sup> This can create a tension between public and private forms of enforcement. However, given that secret cartel conduct is rarely detected without effective public enforcement (which often relies on leniency to bring otherwise secret cartel behaviour to light), private rights to obtain redress for cartel conduct risk

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<sup>4</sup> See [Applications for leniency and no-action applications in cartel cases: \(OFT1495\)](#) which was issued by the Office of Fair Trading in July 2013, and was adopted by the CMA Board in 2014. The CMA recently [consulted](#) on proposed changes to its leniency guidance. See [Applications for leniency and no-action applications in cartel cases \(CMA201con\)](#).

<sup>5</sup> Undertakings that are immunity recipients and individuals who have been given immunity from prosecution for cartel offences will also be exempt from exclusion and/or debarment on the basis of the competition law infringements exclusion grounds under the Procurement Act 2023.

<sup>6</sup> Leniency is distinct from other forms of cooperation such as 'settlement' (i.e. the process whereby a business under investigation is prepared to admit that it has breached competition law which may allow the CMA to achieve efficiencies through a streamlined administrative procedure) and the CMA's power to accept commitments from a business under section 31A of the CA98 in order to address the CMA's competition concerns instead of continuing an investigation. See [CMA investigation procedures in Competition Act 1998 cases \(CMA8\)](#), paragraph 14.3.

<sup>7</sup> See the CMA consultation document [Guidance on applications for leniency in cartel cases](#) (29 April 2025), footnote 14.

becoming abstract if they frustrate the public enforcement process which identifies secret cartel conduct in the first place.

12. The CA98 already provides certain substantive and procedural protections to address this tension. For example, immunity recipients, as defined in Schedule 8A to the CA98, already receive some protection from joint and several liability for damages arising from a cartel infringement, with some exceptions, including where full compensation for loss or damage cannot be obtained from other undertakings involved in the cartel infringement.<sup>8</sup> Cartel leniency statements, as defined in Schedule 8A to the CA98 (whether or not they have been withdrawn), are not admissible in evidence in competition proceedings in the UK, and UK courts, as well as the CAT, are not permitted to make disclosure orders in respect of them.<sup>9</sup>
13. The CMA considers that further enhancing the existing protections from liability for private damages may be justified for recipients of 'Type A' immunity, which is available to the first applicant to report and provide evidence of a cartel when the CMA (or, where relevant, a sectoral regulator) does not have a pre-existing investigation into the reported cartel activity and does not otherwise have sufficient information to establish the existence of the reported cartel activity.<sup>10</sup> 'Type A' immunity is a key tool to uncover cartels that might otherwise go undetected and, therefore, evade both public and private forms of enforcement.
14. Providing undertakings benefitting from 'Type A' immunity with full immunity from liability for damages caused by the cartel would create a further incentive – at least for cartels with a UK focus – for undertakings to report cartel activity,

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<sup>8</sup> See paragraphs 14 to 16 of Schedule 8A CA98; and see in particular paragraph 15, which provides as follows:

'An immunity recipient is not liable (either alone or jointly) to pay damages to a person as a result of the cartel infringement (whatever the legal basis of the liability) except where—

(a) the person acquired a product or service that was the object of the cartel infringement directly or indirectly from the immunity recipient,  
(b) the person acquired a product or service containing or derived from a product or service that was the object of the cartel infringement indirectly from the immunity recipient,  
(c) the person provided a product or service that was the object of the cartel infringement directly or indirectly to the immunity recipient,  
(d) a product or service that was the object of the cartel infringement contained or was derived from a product or service provided by the person, or  
(e) the person is unable to obtain full compensation for the loss or damage from other undertakings involved in the cartel infringement.'

<sup>9</sup> See paragraphs 4, 28(b) and 32(2) of Schedule 8A CA98.

<sup>10</sup> See [Applications for leniency and no-action applications in cartel cases: \(OFT1495\)](#), paragraph 2.9. The CMA recently [consulted](#) on proposed changes to its leniency guidance. See [Applications for leniency and no-action applications in cartel cases \(CMA201con\)](#), paragraph 2.13.

which could aid overall levels of detection and enforcement (both public and private).

15. The CMA considers that full immunity from liability for damages should be limited to undertakings benefitting from 'Type A' immunity that have entered into an immunity agreement with the CMA and that continue to abide by the terms of that agreement. In the CMA's view, this strikes the right balance between creating incentives to be the first to report cartel activity and not undermining the availability of private redress against other members of a cartel (which, by definition, will involve more than one undertaking).<sup>11</sup> It may also be appropriate, in this regard, for such full immunity from damages to be able to be withdrawn by the CAT or the relevant court in cases where full compensation for loss or damage cannot be obtained from other undertakings involved in the cartel infringement (which might be the case for example, if all of those undertakings are insolvent).<sup>12</sup>
16. The CMA considers that providing protection from follow-on private actions in cartel cases addresses a key reason why businesses may decide not to apply for 'Type A' immunity (namely, exposure to private damages in the UK), while at the same time ensuring that the public benefits from detection and enforcement action.

***Q18. Do you consider that additional alternative routes for redress could reduce the need for litigation? For example, could empowering the CMA to issue directions for redress reduce the need for private action?***

17. The CMA's existing powers have, to some extent, already enabled it to achieve a level of redress through its public enforcement functions. For example, CMA investigations in the pharmaceuticals sector have resulted in businesses under investigation offering commitments under section 31A CA98 to address the CMA's competition concerns which included substantial *ex gratia* payments to address potential financial harms arising from the suspected anti-competitive conduct at a level sufficient to ensure deterrence is not undermined.<sup>13</sup>

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<sup>11</sup> 'Cartel activity' means those agreements and/or concerted practices which infringe the Chapter I prohibition by object and involve the fixing or coordinating of purchase or selling prices (including resale price maintenance), bid-rigging (collusive tendering), the establishment of output restrictions or quotas, or market sharing, as well as certain forms of anti-competitive information exchange or sharing.

<sup>12</sup> See paragraph 15(1)(e) of Schedule 8A CA98.

<sup>13</sup> See [NHS set to benefit from £23 million following CMA pharma probe - GOV.UK](#) and [CMA levies fines of £2.3m and secures £8m for NHS in pharma probe - GOV.UK](#)

18. These examples indicate that public enforcement can play an important role in helping to secure redress for competition law infringements in appropriate cases. However, the existing mechanisms available to the CMA in this regard are limited given their voluntary nature. Furthermore, as noted in the Call for Evidence, the statutory framework for voluntary redress schemes introduced by the Consumer Rights Act 2015 has not yet been utilised, which suggests that the incentives for parties to offer redress are generally limited in practice.<sup>14</sup>
19. Empowering the CMA<sup>15</sup> to issue directions for redress could (in conjunction with the CMA's other investigatory powers) provide a more efficient, speedier and effective mechanism to determine and enforce redress in certain types of case which could reduce or avoid the need for persons harmed by a competition law infringement to bring follow on proceedings in the CAT. Doing so could also result in greater legal certainty and transparency about when redress might be available in the context of public enforcement. Furthermore, this would have the benefit of avoiding duplication of public resources arising from the need for the CAT to familiarise itself with issues which have already been investigated by the CMA.
20. The CMA notes that there are already redress powers available to it in respect of its consumer protection and digital markets functions. For example, under the new direct consumer enforcement regime created by the Digital Markets Competition and Consumers Act 2024 (DMCCA), a Final Infringement Notice issued by the CMA may include directions that a party take such Enhanced Consumer Measures (ECMs) as the CMA considers just and reasonable. ECMs may include redress measures requiring a party to offer compensation or other redress to consumers affected by the infringing practice, or measures intended to be in the collective interests of consumers.<sup>16</sup> The CMA has similar

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<sup>14</sup> The CMA seeks to incentivise voluntary redress by undertakings through its approach to calculating penalties for infringements of the CA98 (whilst also ensuring that penalties reflect the seriousness of the infringement and achieve deterrence). For example, the CMA may apply a penalty reduction where an undertaking obtains approval for a statutory voluntary redress scheme or where it considers that an undertaking has made appropriate redress for an infringement outside the framework of the statutory voluntary redress scheme. See [Appropriate CA98 penalty calculation: CMA73 - GOV.UK](#), paragraphs 2.32-2.33.

<sup>15</sup> This response is submitted on behalf of the CMA. However, the CMA considers that it would be appropriate for any such new powers to be given to other regulators who have concurrent powers to apply and enforce the CA98. Moreover, in the absence of such powers being given to the concurrent regulators, the remedies available in particular cases could differ depending on whether a case was allocated to the CMA or to a sector regulator pursuant to the concurrency arrangements under the Competition Act 1998 (Concurrency) Regulations 2014, which would be inappropriate. See [Guidance on concurrent application of competition law to regulated industries: CMA10](#), paragraphs 3.21-3.36.

<sup>16</sup> See DMCCA, s.183 and s.221.

powers when issuing enforcement orders for breaches of conduct requirements imposed under the digital markets competition regime.<sup>17</sup>

21. The CMA envisages that similar powers could be utilised to direct redress where the CMA issues a final infringement decision in a CA98 investigation (including where one or more parties have entered into a settlement agreement). The CMA acknowledges that, since the loss or damage arising from a competition law infringement may often involve some element of pass-on, assessing the appropriate level and method of redress in the CA98 context and the infringing parties' respective contributions may often involve a more complex range of considerations than in consumer enforcement cases and, therefore, the CMA would need to consider on a case by case basis whether it would be appropriate or proportionate for the CMA to order redress.
22. However, the CMA considers that a discretionary power to direct redress could be an effective tool in certain cases which could more quickly and efficiently deliver redress than collective follow-on action. This can include, for example, cases where the harm arising from a competition law infringement has directly impacted a large cohort of consumers but the harm to each individual consumer is of relatively low value, and a level of redress that is just and reasonable in all the circumstances may be relatively clear and ascertainable (such as in cases where the existence and the order of magnitude of an impact on prices - also known as a consumer overcharge - is known from the facts available to have arisen, or can reasonably be assumed to have arisen from cartel activity).<sup>18</sup>

## **Competition and Markets Authority**

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<sup>17</sup> See DMCCA s.31(1)(c) and paragraph 7.100 of the [Digital markets competition regime guidance \(CMA194\)](#).

<sup>18</sup> It will also be appropriate to consider how any CMA competition redress measures would affect private rights to damages in respect of the same infringement. One option could be that any separate action for redress would be precluded in respect of an infringement already covered by a CMA competition redress measure. This would have the advantage of providing legal certainty and increasing efficiency and could incentivise parties voluntarily to propose redress measures. Alternatively, CMA competition redress measures could preclude only collective actions under the CA98, but not other private actions by single parties in respect of the infringement. Another option could be that, similar to the ECMs regime, any CMA competition redress measure would not preclude those harmed from being able themselves to seek redress for the relevant CA98 infringement, including through bringing an action for redress, unless that party agrees to waive their right to do so when accepting redress under the CMA measure in question. Such a waiver would not prevent a person from taking their own civil action for compensation for infringing activity other than that which has given rise to the CA98 infringement decision (as is currently the case for ECMs; see sections 183(5) and (6) of the DMCCA).