



Department  
for Business  
Innovation & Skills

**PRIVATE ACTIONS IN  
COMPETITION LAW:**

A consultation on options for  
reform - government response

JANUARY 2013

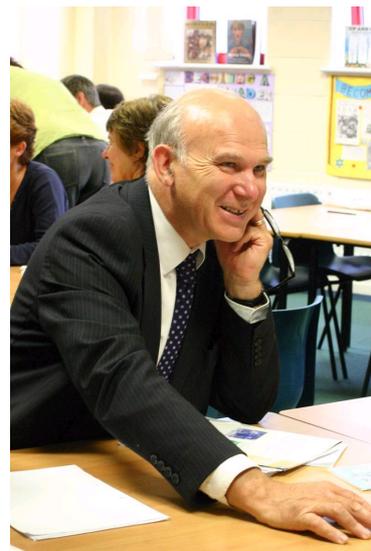
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## Foreword from the Secretary of State

Competitive markets drive growth and innovation, empowering consumers and ensuring that the most efficient and innovative businesses can thrive.

The Office of Fair Trading (OFT) has calculated that consumers benefited from the competition regime by £810 million in 2011/12. However, research by the OFT also shows that businesses view the present approach to private actions as one of the least effective aspects of the UK competition regime. Challenging anti-competitive behaviour is costly and complex, well beyond the resources of many businesses, particularly SMEs, and the financial costs of going to court makes it impractical for consumers to achieve redress.



On 24<sup>th</sup> April 2012 my Department published a consultation on reforming private actions in competition law, making it easier and simpler for consumers and businesses to stand up for their rights. These reforms would complement the reforms to the public competition reform that the Government is implementing through the Enterprise and Regulatory Reform Bill.

As stated in the consultation document, these reforms have two principal aims:

- **Increase growth**, by empowering small businesses to tackle anti-competitive behaviour that is stifling their business.
- **Promote fairness**, by enabling consumers and businesses who have suffered loss due to anti-competitive behaviour to obtain redress.

The responses to the consultation confirmed that the existing private actions regime is not working. Whilst some large businesses are able to successfully bring cases, for the vast majority of consumers and small businesses justice is out of reach. This means that even if the perpetrators of a price-fixing scandal are caught, consumers and businesses still lose out.

While the public competition authorities are at the heart of the regime, they have finite resources and cannot do everything. What is needed from Government is to create the legal framework that will empower individual consumers and businesses to represent their own interests.

For this reason I am announcing wide ranging reforms to the private actions regime, including an enhanced role for the Competition Appeal Tribunal (CAT), a fast-track for procedure for simpler cases and a new opt-out collective actions regime that will genuinely bring redress within reach of the consumer. These reforms are accompanied by stringent safeguards to protect business against frivolous claims, as well as a radically enhanced system of Alternative Dispute Resolution (ADR) that will ensure the courts are the option of last resort.

These are significant reforms that will dramatically increase the ability of business and consumers to hold to account those who have breached competition law. Their implementation will significantly enhance the benefits of the competition regime to our economy, driving improvements for both business and consumers.



**Rt. Hon. Dr. Vince Cable MP**  
**Secretary of State for Business, Innovation and Skills**  
**and President of the Board of Trade**

## Executive Summary

Competition creates growth and is one of the pillars of a vibrant economy. A strong competition regime ensures the most efficient and innovative businesses can thrive, allowing the best to grow and enter new markets, and gives confidence to businesses wanting to set up in the UK. It drives investment in new and better products and pushes prices down and quality up. This is good for growth and good for consumers.

The Office of Fair Trading (OFT) has calculated that consumers benefited from the competition regime by £810 million in 2011/12. However, research by the OFT also shows that businesses view the present approach to private actions as one of the least effective aspects of the UK competition regime. Accordingly, last year the Government consulted on reforming the private actions regime in the UK. The consultation ran from 24 April 2012 to 24 July 2012 and received 129 responses.

There was a strong consensus that the regime was in need for reform. Although the responses suggested that the amount of private actions being brought by large companies was higher than the Government had initially estimated, the legal costs and complexity remained an insuperable barrier for the vast majority of SMEs and consumers.

There was strong support for the proposed reforms to the Competition Appeal Tribunal, with many respondents also supporting in principle a fast-track for simpler cases and the encouragement of ADR, albeit with differing views on the design details. The majority of respondents opposed the principle of introducing a rebuttable presumption of loss in cartel cases. The greatest divergence of opinions concerned opt-out collective actions, where strong arguments were put forward both for and against the reforms.

Having considered the information received, the Government has therefore decided to implement reforms in four main areas:

1. **Establish the Competition Appeal Tribunal (CAT) as a major venue for competition actions in the UK** to make it easier for businesses, especially SMEs, to challenge anti-competitive behaviour that is harming them.

This would involve allowing the CAT to hear stand-alone as well as follow-on cases and giving it the power to grant injunctions. It would also create a fast track for simpler cases in the CAT, delivering swift, cheap results, to empower SMEs to challenge anti-competitive behaviour that is restricting their ability to grow.

The Government will not be introducing a rebuttable presumption of loss in cartel cases or legislating on the passing-on defence.

Although this is a reserved matter, the changes take into account the different legal procedures in the devolved nations.

- 2. Introduce a limited opt-out collective actions regime, with safeguards, for competition law.** This will allow consumers and businesses to collectively bring a case to obtain redress for their losses.

Breaches of competition law, such as price-fixing, often involve very large numbers of people each losing a small amount, meaning it is not cost-effective for any individual to bring a case to court. Allowing actions to be brought collectively would overcome this problem, allowing consumers and businesses to get back the money that is rightfully theirs – as well as acting as a further deterrent to anyone thinking of breaking the law.

Recognising the concerns raised that this could lead to frivolous or unmeritorious litigation, the Government is introducing a set of strong safeguards, including:

- Strict judicial certification of cases so that only meritorious cases are taken forward.
- No treble damages.
- No contingency fees for lawyers.
- Maintaining the ‘loser-pays’ rule so that those who bring unsuccessful cases pay the full price.

Claims will only be allowed to be brought by claimants or by genuine representatives of the claimants, such as trade associations or consumer associations, not by law firms, third party funders or special purpose vehicles. Any unclaimed sums would be allocated to the Access to Justice Foundation (AtJF).

- 3. Promote Alternative Dispute Resolution (ADR)** to ensure that the courts are the option of last resort.

It is essential that those who have breached competition can be taken to court. However, ADR can offer an alternative route to redress and we should be encouraging businesses and consumers to settle their differences outside of the legal system. Respondents emphasised that responsible businesses who wish to make redress to those they have wronged should not be forced to face a lengthy and costly court case.

In addition to strongly encouraging ADR throughout these reforms, the Government is also introducing two more substantive measures to promote ADR:

- Establishing a new opt-out collective settlement regime in the CAT similar to the Dutch Mass Settlement Act (2005).
- Giving the new Competition and Markets Authority a limited role in certifying redress schemes.

- 4. Ensure private actions complement the public enforcement regime.**

The Government considers that it is essential that whistleblowers are not discouraged from informing on cartels. As the European Commission is expected to bring forward proposals within the next few months, the Government is not intending to take domestic action in this area. If the Commission’s proposals are

significantly delayed then the Government will consider bringing forward our proposals.

The Government believes the measures set out in this document have the potential to stimulate growth and innovation by tackling anticompetitive behaviour and to allow businesses and consumers to get a fair deal by obtaining compensation for losses they have suffered.

## 1 The Consultation Process

- 1.1 The Department for Business, Innovation & Skills published a consultation document and accompanying impact assessment on 24 April 2012 entitled 'Private Actions in Competition Law: A Consultation On Options For Reform'. The consultation period ran for 12 weeks, closing on 24 July 2012. The consultation document was sent to a range of relevant key stakeholder organisations and was posted on the BIS website.<sup>1</sup>
- 1.2 The consultation document set out the Government's proposals for reforming the private actions regime. In particular it focussed on:
- Whether the Competition Appeal Tribunal should become a major venue for competition cases.
  - The consideration of an opt-out regime in addition to an opt-in regime.
  - The promotion of Alternative Dispute Resolution as an alternative to legal action.
- 1.3 The questions the Government asked are at Annex A.

### Engagement with stakeholders

- 1.4 Ministers and officials from the Department for Business, Innovation and Skills have taken part in a large number of discussions and events to canvass views from a wide range of individuals and organisations. These have informed the development of the policy and have included meetings with competition and consumer bodies, businesses, academics, lawyers and other interested parties. Examples include:
- The Minister for Competition & Consumer Affairs, Norman Lamb, spoke to the Law Society at their annual conference in May 2012.
  - Officials spoke at conferences and seminars at the University of East Anglia, the Competition Law Society and the British Institute of International and Comparative Law, amongst others.
- 1.5 Annex B contains a list of the main stakeholder events in which BIS Ministers and officials participated.
- 1.6 A number of organisations, including the competition authorities and representative organisations in particular, held additional events to discuss improvements to the competition regime.
- 1.7 This paper sets out the issues that were consulted on, a summary of respondents' views, the Government's analysis of responses, and its decisions. It is published alongside an updated Impact Assessment.<sup>2</sup>

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<sup>1</sup> <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform> .

<sup>2</sup> <https://www.gov.uk/government/publications/>

1.8 The Government would like to thank all those who contributed to the consultation. Engagement with stakeholders will continue through the final policy development stages and legislative process.

1.9 For more information contact:

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## 2 Responses Received

### Number of responses received

- 2.1 The Government received 129 formal written responses from a variety of organisations including SMEs and large enterprises, representative organisations, local and central Government organisations, legal and academic bodies and other interested parties and individuals. A summary of key points made by respondents can be found in chapters 3 to 9, and a list of those who provided written responses is at Annex 3. We have published all of the responses, except those where respondents requested confidentiality. These can be found on the BIS website along with this document.<sup>3</sup>
- 2.2 The table below provides a break down of written responses by type of responding organisation.

*Table 2.1 Break down of responses by type of organisation*

| Type of Organisation   | Responses  |
|--|------------|
| Small and Medium Enterprise (SME)                                | 3          |
| Representative organisation (excluding legal) and interest group | 26         |
| Law Centre/Society   | 17         |
| Legal (claimants)  | 1          |
| Legal (general)  | 29         |
| Legal (other)  | 17         |
| Charity Organisation   | 11         |
| Economists   | 1          |
| Trade Associations   | 8          |
| Large Enterprise   | 5          |
| UK Government body   | 4          |
| Academic   | 7          |
| <b>TOTAL</b>   | <b>129</b> |

<sup>3</sup> See <https://www.gov.uk/government/consultations/private-actions-in-competition-law-a-consultation-on-options-for-reform>.

## Responses on the areas for reform

- 2.3 Not all the respondents commented on all the areas for reform, with representative organisations and government bodies generally providing the broadest responses. The different areas for reform attracted varying numbers of substantive written responses.

*Table 2.2: Break down of substantive written responses by chapter of the consultation document*

| <b>Chapter of the Consultation Document</b> | <b>Responses</b> |
|---|------------------|
| Why Reform Private Actions                  | 65               |
| The Role of the Competition Appeal Tribunal | 66               |
| Collective Actions                          | 68               |
| Encouraging Alternative Dispute Resolution  | 55               |
| Complementing the Public Enforcement Regime | 49               |

### 3 Why reform private actions?

- 3.1 Competition creates growth and brings benefit to consumers. The Office of Fair Trading (OFT) estimates that consumers benefited from the competition regime by almost £810 million in 2011/12, and a strong regime increases innovation and drives investment: it pushes prices down and quality up. On 15 March 2012 the Government announced a range of reforms to the public enforcement aspect of the competition regime, including the creation of the Competition and Markets Authority (CMA) by bringing the Competition Commission (CC) and the competition functions of the OFT together into a single body. These reforms are being implemented through the Enterprise and Regulatory Reform Bill, currently being considered by the House of Lords.
- 3.2 Research from the OFT confirms that private actions are seen as the least effective aspect of the competition regime<sup>4</sup>. Accordingly, on 24 April 2012 Government also published a consultation on reforming private actions in competition law<sup>5</sup>. As stated in the consultation, there are instances where private actions can complement the public enforcement regime to help strengthen the competition framework, by empowering businesses to tackle anti-competitive behaviour that is stifling growth and by enabling consumers and businesses who have suffered loss due to anti-competitive behaviour to obtain redress.
- 3.3 In its consultation, the Government proposed to make changes to four key policy areas:
- Establishing the CAT as a major venue for competition action in the UK.
  - Introduce an opt-out collective action regime for competition law.
  - Promote Alternative Dispute Resolution (ADR), thereby trying to ensure that courts are the options of last resort.
  - Ensure private actions complement the public enforcement regime.

#### Summary of Responses

- 3.4 In total, 129 responses were received to the consultation. The great majority of respondents agreed that reform was necessary, but disagreed as to the extent and form that that reform should take.
- 3.5 In the consultation, the Government observed that between 2005 and 2008 there were only 41 competition cases of any kind which came

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<sup>4</sup> [http://www.offt.gov.uk/shared\\_offt/reports/comp\\_policy/oft916resp.pdf](http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916resp.pdf) and [http://www.offt.gov.uk/shared\\_offt/reports/Evaluating-OFTs-work/oft1391.pdf](http://www.offt.gov.uk/shared_offt/reports/Evaluating-OFTs-work/oft1391.pdf)

<sup>5</sup> <http://bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf>

before the courts in which judgment was delivered and that between 2000 and 2005 there were only 43 out-of-court settlements relating to competition law. Many respondents suggested that these figures were misleading as the number of cases had increased in recent years, though most still settled before going to court. Although it is difficult to say definitely, given the confidentiality of many cases, the strong sense from the consultation was that these cases are almost exclusively between large companies, and that smaller companies and consumers still have no realistic way of challenging breaches of competition law or gaining redress.

- 3.6 Many respondents agreed with Government that aspects of the current regime made it difficult to bring cases, citing, amongst other things, the limited ability of the CAT to hear only follow-on cases<sup>6</sup>, the difficulties with using the procedures under the Civil Procedure Rules (CPR) in the ordinary courts<sup>7</sup> and the inadequacy of the current opt-in collective action in competition law, as exemplified by the case brought by Which? against JJB Sports regarding replica football shirts.
- 3.7 Regarding the specific proposals, the great majority of respondents were in favour of expanding the CAT's jurisdiction to allow it to hear stand-alone cases as well as follow-on cases and to grant injunctions. The majority were also in favour of making it easier for SMEs to bring cases, though there was a range of opinions over the form this should take and the design details of any 'fast-track'. Most respondents opposed introducing a rebuttable presumption of loss or legislating on the passing-on defence.
- 3.8 The Government's proposal to introduce an opt-out collective actions regime generated the most heated debate, with approximately equal numbers of respondents both for and against the procedure, with strong arguments advanced on either side. Some respondents saw such an action as essential, whereas others felt it could not be introduced without leading to abuses.
- 3.9 The great majority of respondents also felt that Alternative Dispute Resolution (ADR) should be strongly encouraged, but not made mandatory, with several highlighting that being able to pursue legal actions is a fundamental legal right. Some highlighted possible ways in which the competition authorities could be involved in delivering redress or in which an opt-out collective settlement mechanism could be introduced in the CAT, to facilitate ADR.
- 3.10 Finally, the majority of respondents emphasised the important of protecting the leniency regime, whilst noting that action would be preferable at a European level, and that the European Commission was drawing up proposals.

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<sup>6</sup> See *Enron vs EWS (I)* [2009]

<sup>7</sup> See *Emerald Supplies Ltd v. British Airways plc.*, [2009]

## The Government's Decision

- 3.11 Losses which can be shown to have been caused by an infringement of competition law are recoverable as a matter of law. In the Government's view, there are particular public policy reasons for taking action to reduce the barriers that businesses and consumers face in pursuing private actions in respect of infringements of competition law. The costs of anti-competitive behaviour in terms of lower output and higher prices of goods and services, and reduced choice and innovation, are not confined to transfers between the infringer and the harmed party but include costs to society as a whole arising from productive inefficiency. These wider costs are one reason why competition law deserves specific measures designed to improve access to redress and prevent social costs arising.
- 3.12 Furthermore, the assessment of whether there has been anti-competitive behaviour and its effects is beyond the resources of individual consumers and many businesses. For example, cartels are covert and other anti-competitive practices are often difficult to identify. Establishing the situation that would have existed in the absence of the anti-competitive behaviour is complex and requires an appreciation of how a market as a whole has been distorted. This will often require expert economic input which can be costly to obtain. In other areas of litigation, the cause of action or dispute will be evident such that there is a much greater prospect of obtaining redress.
- 3.13 The Government has therefore decided to improve the private actions regime, by making it simpler to allow consumers and businesses to seek redress from undertakings that have infringed competition law.
- 3.14 The private actions regime cannot be improved by any single measure. Instead, the Government recognises that a range of reforms to achieve the optimum outcomes.
- 3.15 The Government wishes to enable consumers and businesses to bring cases against undertakings that are suspected of having breached competition law, both to challenge anti-competitive behaviour and to achieve redress. It is clear from the consultation that the CAT is an organisation with unfulfilled potential and that an expansion of its role will help fulfil those aims.
- 3.16 Equally though, the Government wishes litigation to be the option of last resort. Accordingly, it will be necessary to encourage ADR, both through court rules and through establishing new procedures whereby businesses who wish to can make redress quickly and easily.
- 3.17 Finally, whilst the Government agrees that protecting the leniency regime is essential, but that action would be better taken at a European level.

3.18 Accordingly, the Government has decided to:

- **Establish the Competition Appeal Tribunal (CAT) as a major venue for competition actions in the UK.** This would include allowing the CAT to hear stand-alone cases and grant injunctions, as well as the establishment of a fast track for simpler cases.
- **Introduce a limited opt-out collective actions regime, with safeguards, for competition law.**
- **Promote Alternative Dispute Resolution (ADR)** to ensure that the courts are the option of last resort. This would include establishing a new opt-out collective settlement regime in the CAT and giving the new Competition and Markets Authority a limited role in certifying redress schemes.
- **Ensure private actions complement the public enforcement regime.** As the European Commission is expected to bring forward proposals shortly, the Government is not intending to take domestic action in this area. If the Commission's proposals are significantly delayed then the Government will consider bringing forward proposals.

### **Terminology**

3.19 Throughout this document, any future reference to the Office of Fair Trading should be considered to apply equally to its successor, the Competition and Markets Authority, in terms of role, powers and functions.

## 4 The Role of the Competition Appeal Tribunal (CAT)

### Summary of the Government's decisions

The Government has decided:

- To extend the CAT's jurisdiction **to allow the CAT to hear standalone as well as follow-on cases.**
- **To enable the courts to transfer (standalone and follow-on) competition law cases to the CAT and vice versa.**
- That **the limitation periods for the CAT should be harmonised with those of the High Court of England and Wales, the High Court of Northern Ireland and the Court of Session in Scotland**, for cases that fall within the respective jurisdictions.
- **To enable the CAT to grant injunctions.**
- **To introduce a fast-track procedure for simpler competition claims in the CAT**, to empower SMEs and others to challenge anti-competitive behaviour that is restricting their ability to grow.
- **To allow the CAT to award pro-bono costs.**
- **Not to introduce a rebuttable presumption of loss** for cartel cases
- **Not to address the passing-on defence in legislation.**

### The Issue and Proposals

- 4.1 The consultation considered a number of options aimed at making the CAT a major venue for competition litigation in the UK and to make it easier for businesses, in particular SMEs, to bring competition cases. These included allowing the CAT to hear standalone cases, enabling it to grant injunctions, introducing a fast-track procedure and legislating on the quantification of damages in order to decrease the evidential burden on the claimant. Reform would ensure that the CAT has the jurisdiction and powers needed to process cases efficiently whilst ensuring procedural fairness for both claimants and defendants.

## The CAT's Jurisdiction and Powers

### The Questions

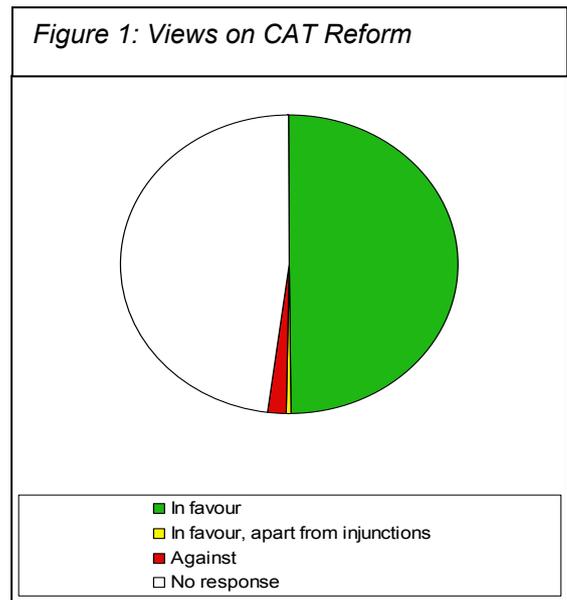
**Q.1** Should Section 16 of the Enterprise Act be amended to enable the courts to transfer competition law cases to the CAT?

**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?

### Summary of Responses

4.2 The great majority of respondents who commented on this proposal (see Figure 1) were supportive of extending the CAT's jurisdiction to allow it to hear standalone as well as follow-on cases. Respondents agreed that all competition cases should be able to be heard before the specialist tribunal and that it should be possible to start them there directly, rather than simply transferring them from the High Court or Court of Session.



4.3 The great majority of Respondents similarly considered that the CAT should be allowed to grant injunctions (or, in Scotland, interdicts), as stopping harmful anti-competitive behaviour is often more important to a business than obtaining redress. It was observed that choice of remedy can be a key factor in choosing jurisdiction, meaning that the CAT would have to have this power if it was to become the venue of choice for competition claims. A small number of respondents considered that it would not be appropriate to allow the CAT to grant interdicts as none of the tribunals that currently sit in Scotland are empowered to grant interdicts and, to quote the Judges of the Court of Session, "*It would be highly unusual to empower a tribunal in this way*". However, this view was a minority view, with other leading Scottish legal bodies, including the Faculty of Advocates and the Law Society of Scotland, considering that the ability to grant interdicts would be appropriate.

4.4 Some respondents observed that if the CAT were to hear standalone cases it would be desirable to harmonise the limitation periods between the CAT and the High Court. The City of London Law Society, for example, said that this would be "*important to ensure that a two speed approach does not arise and that there is no room for confusion as to*

*which time limit applies.*” A small number of respondents also raised issues concerning the CAT’s ability to grant pro-bono costs and to punish contempt of court, if it were granted these new powers.

## The Government’s Decision

- 4.5 The Government has decided **to extend the CAT’s jurisdiction to allow the CAT to hear standalone as well as follow-on cases**. This is likely to be achieved through amendment of Section 47A of the Competition Act 1998. The Government also intends **to enable the courts to transfer (standalone and follow-on) competition law cases to the CAT and vice versa**, either through activation of Section 16 of the Enterprise Act (2002) or by other means.
- 4.6 In common with the great majority of respondents, the Government considers that such changes would allow the CAT to reach its unfulfilled potential in relation to private enforcement, as well as making it easier to bring competition claims by reducing the opportunity for contesting jurisdiction. The Government considers that the CAT has the necessary expertise and capacity to become a major venue for competition litigation and that both claimants and defendants are likely to benefit from its efficient case management and flexible procedures.
- 4.7 The Government also agrees with respondents that it will be necessary to harmonise the limitation periods and has therefore decided that **the limitation periods for the CAT should be harmonised with those of the High Court**, with the six year limitation period<sup>8</sup> to apply to all private action cases in the CAT brought in England and Wales and Northern Ireland, whether stand-alone or follow-on. In Scotland the limitation period will remain five years in line with the Scottish Court of Session. The Government also **sees the advantage of enabling the CAT to grant pro-bono costs**, but does not consider this reform as high a priority as the other discussed changes.
- 4.8 The Government also considers that if the CAT is genuinely to become a major venue for competition litigation it must have access to the full range of remedies, including not just damages but injunctions. As the Government stated in its consultation document, frequently redress and damages are less important to the claimant than simply causing the anticompetitive activity to stop – a view that was echoed by many respondents. The power to grant injunctions is also an essential component of the fast track procedure, discussed below, which is intended to focus on injunctive relief. The Government has therefore decided **to enable the CAT to grant injunctions**. This will require primary legislation. However, the Government recognises that any changes should not undermine the primacy of the Scottish Court of Session and therefore the CAT will not be able to issue interdicts.

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<sup>8</sup> As set out in the Limitation Act (1980)

- 4.9 As regards the appropriateness of the CAT, a tribunal, being able to grant injunctions, the Government notes that in England and Wales the Upper Tribunal already has the power to grant injunctions. The Government considers the CAT's powers and rules of procedure, the fact that the CAT's decisions are appealable to the Court of Appeal (in relation to CAT proceedings in England and Wales), the Court of Session (in relation to CAT proceedings in Scotland) and the Northern Ireland to the Court of Appeal (in relation to CAT proceedings in Northern Ireland) and the fact that its chairs are High Court Judges or equivalent, together mean that the CAT is an appropriate body to be given the ability to grant injunctions.
- 4.10 The Government also recognises that the CAT will require consequential powers to accompany the ability to grant injunctions, including the ability to require cross-undertakings of damages and the ability to ensure that injunctions are obeyed, and such powers will accordingly be provided as appropriate.

## Fast track procedure

### The Questions

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

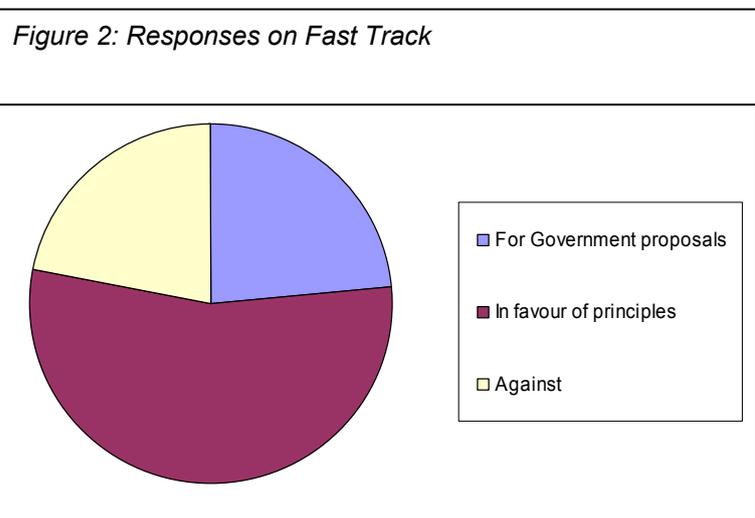
*Q.5 How appropriate are the design elements proposed, in particular cost thresholds, damage capping and the emphasis on injunctive relief?*

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

### Summary of Responses

#### Introduction of a fast track in the CAT

- 4.11 A majority of those who answered this question supported some reforms to support access to justice for SMEs (please see Figure 2), though some of these believed that some design changes should



be made to the proposals set out in the consultation. The CBI, for example, said that the “*Proposal needs further thought.*”

- 4.12 In its response, the Competition Law Association stated: “*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.*”
- 4.13 The City of London Law Society said: “*...it appears to us that no competition law case is the same. Rather, they often vary greatly in complexity. Therefore, more discretion should be given to the CAT to vary time and costs limits and liability caps.*” There were also similar concerns from other respondents including Slaughter and May, Law Society of England and Wales, and Consumer Focus.
- 4.14 A few respondents were against the introduction of a fast track regime. Hogan Lovell argued that the complexity of competition cases means that a fast track regime would not handle them in an efficient or just manner. Baker and McKenzie LLP added: “*It is already possible to obtain injunctive relief in respect of anticompetitive behaviour from the High Court – where necessary on an interim basis and on very short notice (literally at any time of the day or night). It is therefore unclear why a fast track process is required in addition to the power to grant injunctive relief.*”
- 4.15 The Chancery Division of the High Court replied, in their response, that there are suitable alternatives for seeking urgent relief within the High Court. In their opinion this would therefore negate the need for a specialist fast track regime.

#### Design elements of a fast track

- 4.16 Some of those opposing this intervention entirely argued that it would be unjust to have a track limited to SMEs. This was also raised by several respondents who supported some intervention, including the Confederation of British Industry and the City of London Law Society. The CBI thought it: “*...unclear what turnover threshold defines an SME and why a specific class of companies requires privileged status before the CAT.*” Other organisations, such as Which?, felt that the fast track should be open to consumers who wished to bring claims.
- 4.17 Similarly, some respondents were concerned that the costs and timescales set out in the consultation document would lead to lower quality judgements, and many of those suggesting design changes to the fast track argued that the six month limit set out in the consultation was too short. The Law Society of England and Wales stated that the

timeline would be too short where a claimant was seeking damages. Their proposed alternative would require the CAT to consider timetabling and cost-capping at the beginning of each case.

- 4.18 A range of views were expressed on cost thresholds and damages caps, with a majority of respondents highlighting at least one of these issues and suggesting that higher or more flexible caps were required given the complexity of competition cases. There were a range of respondents across the legal, consumer and business professions who raised concerns over the level of caps.
- 4.19 The majority of respondents who expressed an opinion agreed on the fast track's focus on injunctive relief. A small number, however, suggested that the CAT should not be able to waive cross-undertakings in damages. The respondents who tended question whether the CAT should waive cross-undertakings were mostly law firms. Herbert Smith LLP<sup>9</sup> stated in their response: "...we believe that the proposal to waive the requirement for cross-undertakings in damages in respect of interim injunctions is problematic and poses serious risks for the rights of the defence."
- 4.20 A suggestion that injunctions should be subject to the same stringent conditions as in the High Court was also made by a small number of respondents. Academics at Brunel University raised concerns that injunctions in fast track cases would be too broad a power to be used.

#### Other actions to support SMEs

- 4.21 As noted above, some respondents supported more general reforms to CAT case management rather than a specific fast track. No respondents supported the idea of letters being issued by the OFT to those accused of anti-competitive behaviour.

### **The Government's Decision**

- 4.22 The Government has decided to **introduce a fast track regime for simpler cases in the CAT**, though with more flexibility than the model originally proposed in the consultation. This fast track will be intended to be principally for the benefit SMEs, and the CAT will seek to prioritise cases involving companies which would otherwise find it more difficult to obtain access to justice. However, there will be no absolute limits on who can bring cases, as the Government recognises that there are advantages in simpler cases by larger companies being resolved quickly where possible.
- 4.23 The fast track will focus on granting injunctive relief as the most important thing for a business is often for the anti-competitive

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<sup>9</sup> Now Herbert Smith Freehills

behaviour to simply stop. All cases on the fast-track must be considered for injunctive relief very early in the process and prioritised for injunctive relief if possible.

- 4.24 A CAT Chair will take the ultimate decision on admitting a case to the fast track. There will be a presumption that any case brought by an SME will be considered for fast track; cases between two larger companies could be fast tracked by mutual consent, if the Chair agrees it is suitable. Other factors, to be set out in the CAT rules, such as the likely length of trial, number of expert witnesses and level of damages will also play a role in determining whether a case was suitable for the fast track and the fast track would not be used for novel or precedent-setting cases, or for collective actions.
- 4.25 All cases on the fast-track must be cost-capped and, if a cross-undertaking for damages has been awarded for an interim injunction, these must also be capped. There will be no limit to the level at which these caps will be set, which will be set on a case-by-case basis by the CAT Chair. These caps will be established early on, probably at the first case management conference. If these caps are such that the litigant does not feel able to proceed, they will be able to end the case with no costs.
- 4.26 This approach avoids a generic time, cost or damage cap on all cases, which many respondents felt would be inflexible. However, it ensures that in each individual case clarity is provided as to the maximum possible liability for the claimant and therefore should give SMEs confidence to proceed with cases.
- 4.27 The CAT will have the power to limit the amount of evidence and expert witnesses produced by each side and the presumption will be that normally no more than two expert witnesses on each side may be helpful.
- 4.28 The Government believes that the introduction of a fast track in this form reflects the general agreement of consultation respondents that reforms are needed to assist SME access to justice, whilst also retaining the necessary flexibility in what is a complex area of law.
- 4.29 The fast-track will be implemented through amendments to the CAT's Rules of Procedure. The CAT will also provide clear and accessible guidance setting out the process for bringing a fast-track case that will mean that claimants can make an informed judgement about whether to bring their cases forward.

## Presumptions on the Quantification of Damages

### The Questions

**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?*

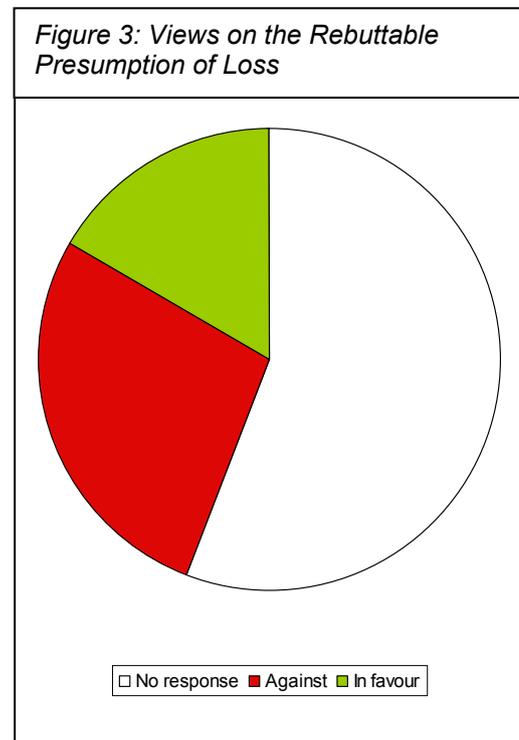
### Summary of Responses

#### Rebuttable presumption of loss

4.30 The majority of respondents who commented on the question of a rebuttable presumption of loss were opposed to the proposal (see Figure 3). Some felt that it would shift the scales of justice too much in favour of the claimant whilst others, such as the Law Society of England and Wales, observed that it would be a “*departure from the normal English law position that loss must be proven*”.

4.31 Other objections to the proposal were that such a presumption would be unlikely to save time, as in most circumstances both claimant and defendant would seek to rebut the presumed loss by adducing evidence, that it could lead to spurious claims, that it was unnecessary as claimants are already able to access the information they needed by means of the UK’s rules on disclosure, or that as the distribution of cartel overcharges is very wide, with some cartels causing no overcharge at all, to presume any specific number would be inappropriate.

4.32 Those who supported the proposal typically felt that it would help to overcome the informational disadvantage of the claimant in bringing cases. The National Farmers’ Union, for example, said that it would “*help reduce the disincentives for parties to start litigation against cartels by addressing the imbalance of information which presently favours the defendant.*” Others felt that it could lead to faster resolution of claims and/or help reach early settlement decisions. Some, such as Firstassist Legal Expenses Insurance Limited, felt that there should be



a presumption of overcharge but not of any specific figure. Of those respondents who did give their support to a specific figure (a minority of those responding), the majority felt that 20% was appropriate.

- 4.33 One important issue raised by both supporters and opponents of the proposal is that it was unclear how such a presumption would work in a case in which there were multiple levels of purchasers. If the presumption took effect at each level, this could result in a situation which, in the view of the International Chamber of Commerce, “*would be incredibly unjust on defendants who may end up paying several times over for the same loss.*” This point was also recognised by some of those who supported the proposal, such as Hausfeld LLP, who said that “*We believe there should be a rebuttable presumption of loss but that this should be available to direct purchasers only.*” To this extent, the proposal is intimately entwined with the issue of the passing-on defence: in the words of the City of London Law Society, “*it is not clear how such a presumption can be introduced without resolution of whether the passing on defence is to be permitted.*”

#### The Passing-On Defence

- 4.34 The majority of respondents who commented on this issue were opposed to the idea of legislating on the passing on defence. Many of the respondents endorsed comments from the Government’s consultation, including the fact that it appeared to be already available under English law and that any legislation would be likely to advantage either consumers or direct purchasers at the expense of the other. Others, such as the Competition Law Association, put forward the view, also referred to in the consultation, that “*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*” and that any passing on should simply be taking account of when quantifying loss.
- 4.35 A small number of respondents were in favour of legislating on the passing on defence, though these differed in their opinion of what form that legislation should take. Some small business representatives considered that the balance should be weighted in favour of direct purchasers; for example, the International Small Business Alliance said that “*there should be an assumption that the overcharge was not passed on or alternatively that victims are entitled to recover in full the overcharge notwithstanding that they have passed on all or part of the overcharge.*” On the other hand, some consumer groups considered that the opposite should be true, with Consumer Focus arguing that “*there should be a presumption that end consumers have borne the overcharges generated by the unlawful practices.*” A small number of legal and academic respondents also considered that, although the passing-on defence did exist, the situation should be clarified as, to quote Eversheds LLP, “*the lack of firm judicial pronouncement on the issue creates uncertainty for both defendants and claimants.*”

## The Government's Decision

- 4.36 The Government recognises the strong arguments, both principled and pragmatic, presented against introducing a rebuttable presumption of loss. In particular it appreciates that to introduce such a presumption would be a departure from one of the basic principles of English law, that in many cases substantial economic evidence would still be required as the defendant would seek to rebut the presumption and that there are significant difficulties in introducing such a presumption in cases where there may be more than one layer of purchaser.
- 4.37 **Accordingly, the Government has decided not to introduce a rebuttable presumption of loss for cartel cases.**
- 4.38 Regarding the passing on defence, in line with the majority of respondents, the Government's position remains that there is no strong case for new legislation explicitly addressing the passing-on defence. Whilst the Government accepts that there might be some small benefit in terms of certainty from legislating, it considers that, under general principles of English tort law, there is no reason why the passing-on defence should not be allowed and considers that the fine details of its application would be better addressed through judicial case law than via legislation.
- 4.39 **Government has therefore decided not to directly address the passing-on defence in legislation.**

## 5 Collective Actions

### Summary of the Government's decisions

The Government has decided:

- **To introduce a limited opt-out collective actions regime, with safeguards, for competition law.** The regime would apply to both follow-on and standalone cases, with cases to be heard only in the Competition Appeal Tribunal
- That the CAT will be required to certify **whether a collective action brought under the regime should proceed under an opt-in or an opt-out basis.**
- To provide that the underlying claimants in such a case could be **either consumers or businesses, or a combination of the two.**
- **That claims should be able to be brought either by claimants or by genuine representatives of the claimants only,** such as trade associations or consumer associations, but not by law firms, third party funders or special purpose vehicles.
- **To establish a range of safeguards within the collective actions regime** to protect against frivolous or unmeritorious cases being brought, including:
  - **A strong process of judicial certification,** including a preliminary merits test, an assessment of the adequacy of the representative and a requirement that a collective action must be the best way of bringing the case.
  - **Establishing that the 'opt-out' aspect of a claim will only apply to UK-domiciled claimants,** though non-UK claimants would be able to opt-in to a claim if desired.
  - **Prohibiting treble or exemplary damages.**
  - **Applying the loser-pays rule in the assessment of costs and expenses** and explicitly clarifying in the CAT Rules of Procedure that this should be the starting point for such assessments.
  - **Prohibiting contingency fees,** though continuing to allow conditional fees and after the event insurance.
  - **Requiring any unclaimed sums to be paid to the Access to Justice Foundation,** though leaving defendants free to settle on other bases, including on a cy-près or reversion-to-the-defendant basis, subject to approval by the CAT judge.
  - **Requiring that any opt-out settlement must be judicially approved.**
- **To introduce a new opt-out collective settlement regime for competition law in the CAT,** similar to the Dutch Collective Settlement Act 2005, to allow businesses to quickly and easily settle cases on a voluntary basis.

## The Issue and Proposals

- 5.1. The Consultation considered whether to introduce an opt-out collective actions regime for competition law to allow businesses and consumers to obtain redress. It also considered who should be permitted to bring such actions as well as the design details of such a regime, including what safeguards should be put in place to prevent the abuse of such a regime via an increase in speculative or unmeritorious claims.

## Opt-in or Opt-out: Collective Actions

### The Questions

- 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.*

### Summary of Responses

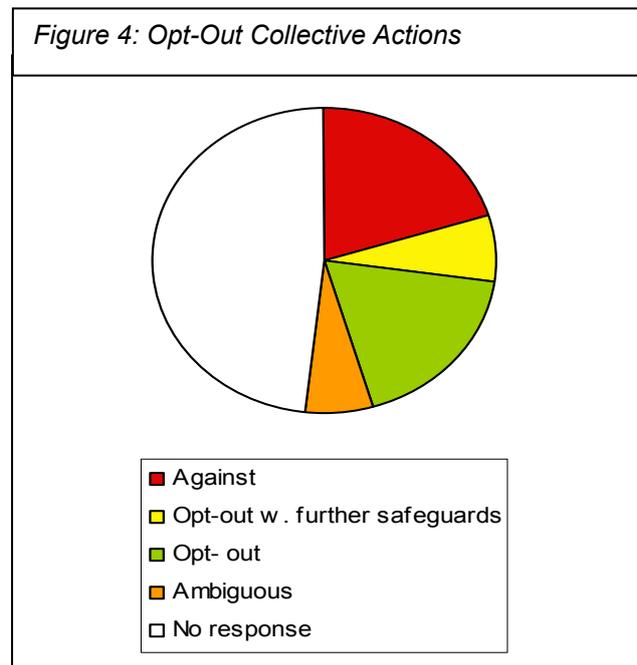
- 5.2. The majority of respondents agreed with the Government's position that reform was needed, citing the fact that there had only been one case and that consumers found it difficult to obtain redress. Whilst there was a range of views as to how the system should be reformed – Which? arguing for an opt-out system whilst the CBI suggesting a regime focused on ADR – the consensus over the need for reform of some form was strong. A small number of respondents disagreed, with the Competition Law Association arguing that some of the arguments based on the Which? Replica Football Shirts case were “*an over simplification*” and Herbert Smith suggesting that the fact there had

been only one case “*should not automatically lead to a conclusion that the current regime is failing.*”

- 5.3. The majority of respondents also considered that redress should be the primary objective of introducing collective actions. The City of London Law Society, for example, said that “*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.*” Other respondents, such as Maclay, Murray and Spens LLP recognised that “*a secondary issue is strengthening future compliance and deterrence.*” The majority of respondents also agreed with the Government that there should be no distinction between standalone and follow-on actions and suggested that, in the words of Herbert Smith, “*excluding stand-alone claims from a revised collective action regime may give rise to difficulties and issues in respect of the jurisdictional scope of such an action, such as have arisen in relation to the limitation on the CAT’s current Section 47A CA98 follow-on*”.
- 5.4. Respondents had more mixed views on whether or not collective actions should be extended to businesses as well as consumers, with some respondents considering that such a regime should only apply to consumers, as businesses would be able to bring actions themselves, whilst others felt there was no reason that businesses should be barred. A number of respondents drew a distinction between SMEs and larger businesses, with the City of London Law Society, for example, saying, “*We are in principle supportive of collective actions being made available to businesses, provided, however, that they are only made available to businesses who would not otherwise have appropriate access to redress. In particular, we recognise that in some cases the barriers that hinder consumers from seeking redress will also apply to SMEs.*” A small number of organisations observed that even if collective actions were extended to both consumers and businesses, identical arrangements need not apply to both, with Which? saying “*For example, it might be appropriate for different funding mechanisms to apply to each type of case.*”
- 5.5. Amongst business organisations themselves, opinion was divided, with the CBI stating strongly that “*A clear distinction should be made between the interests of consumers and those of businesses, including SMEs*” whilst other business organisations, such as the National Farmers Union, National Franchised Dealers’ Association and the Association of Independent Music, supporting collective actions being available to business: “*The NFU would welcome proposals to facilitate SMEs to prepare private actions to correct breaches of competition law through enabling collective actions and also actions by representative bodies on behalf of their members.*”
- 5.6. The great majority of respondents did not see a need to introduce special measures to prevent anti-competitive information sharing. The Competition Law Association stated that “*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.”*

- 5.7. Respondents were most sharply divided over the question of whether an opt-out approach was necessary. As figure 4 shows, approximately 40% of respondents supported opt-out with a similar number opposed. The remainder either did not express a clear preference (as the Consultation observed, the boundary between opt-in and opt-out is not a distinct one, as claimants must at some point opt-in<sup>10</sup>) or alternatively supported a different model, such as pre-damages opt-in or a claims assignment model.



- 5.8. Strong arguments were advanced by respondents on both sides of the debate. Which? argued that collective action reform “*could have a hugely positive impact but only if such a system could operate, where appropriate, on an opt-out basis*”, a view supported by Citizen’s Advice, who stated that “*consumers affected may not be aware of the case or have the resources in time and ability to engage*” and the OFT, who observed that an opt-out system “*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.*” The Association of Independent Music said that “*we feel an opt-out model might be preferable for our members*” whilst the Law Society of England and Wales considered that “*the ability to bring opt-out collective actions is essential for consumer cases to be successfully brought*”. Which? observed that, provided adequate safeguards such as judicial supervision and the ‘loser-pays’ rule were in place, “*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.*”
- 5.9. On the other hand, the Competition Law Association observed that introducing an opt-out regime “*would constitute a radical reform of the*

<sup>10</sup> See paragraph 5.16 of consultation.

*English civil justice system and we are not convinced that the evidence shows that such changes are required or wanted”, whilst the CBI considered that “introducing opt-out class actions carries unacceptable risks, which must be avoided” and went on to say that under an opt-out system “companies are faced with exaggerated claims which damage their reputation and financial standing.” Some respondents also expressed doubt about the benefits of an opt-out model as well as concern over the risks: the International Chamber of Commerce, for example, said it “is unclear why a greater number of claimants would claim their share from an opt-out fund post-quantification than had opted-in to the Which? claim.” Some of these respondents suggested strengthening the existing opt-in system, for example by increasing the number of bodies that could bring cases, or supported the introduction of pre-damages opt-in, which Eversheds, for example, stated “seems to be an acceptable ‘half-way house’.”*

- 5.10. Some respondents also emphasised the importance of ADR. The CBI, for example, argued that: *“ADR offers a quicker, cheaper form of redress”* whilst other respondents argued that an opt-out collective settlement procedure would be a desirable complement to any opt-out right of action as *“It seems contrary to policy to oblige people to bring litigation (if the proposal were to become legislation, adopting an opt-out claim basis) if a consensual solution is available commercially but would be assisted by a legal framework and procedure to make it effective.”* (Fairgrieve et al). ADR is discussed in more detail in Chapter 6, below.

### **The Government’s Decision**

- 5.11. The Government recognises that there are strong and passionately held views on both sides of this debate. It recognises the concern of those respondents who worry about frivolous cases and has no wish to introduce a regime that would create a ‘litigation culture’.
- 5.12. Equally though, it is very clear that the current system of collective redress does not work. Consumers are not currently getting redress for breaches of competition law. It appears unlikely that simply tinkering with the opt-in system would deliver the desired access to justice, nor would a system purely focused on ADR – though ADR, alongside collective actions, is vital and will be strongly encouraged. Consumer groups have been clear that they would not take another case under an opt-in system and that bodies such as the Law Society of England and Wales have said that an opt-out regime is essential if consumer cases are to be brought successfully. It is also clear that, as indicated in the consultation, there are some cases that could only ever be brought on an opt-out basis in practice.
- 5.13. The Government does, however, firmly agree that strong safeguards would be needed as part of an opt-out regime. The design details will

therefore be critical and a range of safeguards, including certification, limited jurisdiction, no contingency fees or treble damages and limits on the type of bodies permitted to bring cases, are discussed further below. The Government further notes that opt-out regimes have been introduced into a range of countries such as Canada, Australia, Spain, Portugal, Poland and Norway, where they have not led to widespread abuses, and that an effective and proportionate opt-out regime can be of benefit for both UK businesses and consumers.

- 5.14. The Government has therefore decided to introduce a **limited opt-out collective actions regime, with safeguards, for competition law, with cases to be heard only in the Competition Appeal Tribunal.**
- 5.15. The Government does recognise that there may be some collective actions which would be more appropriately brought on an opt-in basis, such as a case brought by a small number of businesses all of whom are clearly identifiable.
- 5.16. **It has therefore decided that the CAT will be required to certify whether a collective action brought in the new regime is suitable for collective action and whether it should proceed under an opt-in or an opt-out basis.**
- 5.17. The Government further agrees with the majority of respondents that there should be no distinction between follow-on and standalone cases in the collective actions regime. A particularly important point was that trying to make such a distinction in individual cases is what has led to the current unsatisfactory situation with regards to the CAT, which the Government (supported by the great majority of respondents) has now decided to reform.
- 5.18. Regarding whether collective actions should be available to both consumers and businesses, Government recognises that in some cases businesses will be well-placed to take action themselves, without the need for a collective action. The Government therefore believes that collective actions should only be certified if that is the best way of bringing a case.
- 5.19. On the other hand, there may be occasions, such as the hypothetical 'printer cartridge' case highlighted in the consultation where it would be perverse to require multiple cases to be brought or for businesses and consumers to be treated differently. As was acknowledged by many respondents, it is also the case that small businesses may often have difficulty in bringing cases themselves, and would be likely to benefit from taking part in a collective action.
- 5.20. The Government has considered whether or not different provision should be made for SMEs and larger businesses. However, it has listened to the points made by the majority of respondents on the question of the Fast Track Procedure, that it is in practice difficult to

distinguish between large and small businesses in terms of access to court procedures. The Government has listened to respondents on that proposal and, accordingly, believes that similar principles should be applied in the case of collective actions.

- 5.21. **The Government has therefore decided that collective actions should be available in both follow-on and standalone cases, with cases to be heard only in the Competition Appeal Tribunal, and may be brought on behalf of either consumers or businesses, or a combination of the two.**
- 5.22. The Government has also listened to those respondents who felt that greater emphasis needed to be given to ADR. As stated in the consultation, the Government strongly supports ADR and believes that every support should be given to businesses that wish to voluntarily settle cases and make amends to those that have suffered loss. It recognises that the ability to make redress in this way is an important protection against what could otherwise be lengthy court action and is therefore beneficial to both defendants and claimants. It also recognises, as highlighted by some respondents, that the Dutch Mass Settlement Act 2005 has been effective at distributing tens of millions of euros to those who have suffered loss.
- 5.23. For this reason, in addition to giving the OFT a role in facilitating redress, **the Government has decided to introduce a new opt-out collective settlement regime for competition law in the CAT**, similar to the Dutch Mass Settlement Act (2005), to allow businesses to quickly and easily settle cases on a voluntary basis. This is discussed in more detail in Chapter 6, below.

## Public or private opt-out?

### The Questions

*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?*

### Summary of Responses

- 5.24. The majority of respondents considered that, if opt-out collective actions were to be made more widely available, they should be able to

be brought by private parties rather than only by the competition authority. The Competition Law Association, for example, said that *“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.”* Some, such as Which?, said that they *“would be supportive of public bodies being involved as an additional option.”*

- 5.25. Those respondents who argued in favour of restricting opt-out actions to the public authority were predominantly ones which opposed the actions occurring at all, and saw the limit as a safeguard against abuse: the BRC argued that *“Public enforcement is critical in ensuring that businesses are not blackmailed by the threat of action into settling claims under threat of a collective action when they do not really believe they have committed a violation.”* Some respondents also made a more positive argument for public cases. In the words of Professor Chris Hodges, *“Public agencies that are responsible for enforcement of non-competition law are now achieving payment of restorative compensation very quickly indeed, and at low cost and with great efficiency in terms of public resource and expenditure.”*
- 5.26. As to which private parties should be able to bring cases, the majority of respondents considered that it should be restricted either to the claimants themselves or to bodies that genuinely represented the claimants, such as consumer or trade associations, and that law firms or third party funders should not be allowed to bring cases.
- 5.27. This view was not only shared by most business and consumer groups, but also by the majority of legal organisations. The Competition Law Association said that *“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”* whilst the CLLS said that it *“would need to be ensured that the representative claimant was not merely a ‘straw man’ or nominal figurehead claimant to front an action for the law firm and/or funder, but had a genuine interest in the running and outcome of the claim.”* Which? suggested that *“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.”*

## **The Government’s Decision**

- 5.28. Whilst recognising the concerns of those who would restrict the ability to bring opt-out collective actions to a public authority, the Government considers that sufficient safeguards (as described below) can be built into the regime that this would not be necessary. In addition, such a

move would run counter to the fundamental premise of the Government's policy, which is to empower consumers and businesses to challenge anticompetitive behaviour, and facilitate their fundamental right to seek redress for themselves for damages that they have suffered.

- 5.29. Furthermore, the Government would have significant concerns that to provide the OFT with such powers could lead to an undesirable diversion of public resources into bringing collective actions, at the expense of its core remit of detection and deterrence of anticompetitive activity. Whilst the Government agrees that some role for the OFT in facilitating redress is desirable (see Chapter 6, on ADR, below), it does not believe that should extend to the ability to bring collective actions.
- 5.30. Regarding what sort of private parties should be able to bring cases, the Government agrees that there could be a risk of abuse if legal firms, funders or special purpose vehicles established solely for the purpose of litigation were allowed to bring cases. Government believes that only those who have a genuine interest in the case, such as genuinely representative bodies (such as trade associations or consumer associations) or those who have themselves suffered loss should be allowed to bring cases.
- 5.31. For the avoidance of doubt, the Government proposes to abolish the requirement for a list of suitable bodies to be established by the Order of the Secretary of State and to instead rely on the representative's suitability being assessed by the CAT at certification (see below). Firstly, it appears possible that a limit to the number of bodies may have acted as a bar to cases being brought under the existing opt-in regime and, secondly, as cases will be able to be brought on behalf of both consumers and businesses, a body that was a suitable representative in one case might not be a suitable representative in another.
- 5.32. The Government has therefore decided **that claims should be able to be brought either by claimants or by genuinely representative bodies only, such as trade associations or consumer associations, but not by law firms, third party funders or special purpose vehicles.**

## Safeguards: Design details of an opt-out regime

### The Questions

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

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

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

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

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

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

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

## Summary of Responses

- 5.33. The great majority of respondents strongly agreed with Government that, if an opt-out system were to be introduced, there would be a need for strong safeguards to protect against vexatious claims or frivolous litigation. In the words of the law firm Herbert Smith<sup>11</sup>, the system “*must provide adequate safeguards to prevent unmeritorious claims being brought, avoiding the excesses of the US class action system*”.
- 5.34. Each of the design details set out in the consultation will be discussed in turn, as will be the question of jurisdiction, which was raised by some respondents as an important consideration.

## Certification

- 5.35. The great majority of respondents agreed with Government that a certification procedure was a vital safeguard in terms of ensuring that only meritorious claims were brought. The City of London Law Society stated “*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.*”
- 5.36. With regards to the list of issues considered, the majority of respondents considered that these were important ones, with particular

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<sup>11</sup> Now Herbert Smith Freehills

focus being placed by some respondents on the preliminary merits test. Professor Rachael Mulheron and Vincent Smith argued that *“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.”*

- 5.37. Some respondents suggested other matters that could be considered at certification, including how to deal with multiple claims brought by multiple claimants, whether security for costs needed to be ordered, whether the claim had an appropriate jurisdiction or was within the limitation period and whether sub-class representatives were required.

### Jurisdiction

- 5.38. Some respondents raised the question, not discussed in detail in the consultation, of what the position would be of underlying claimants who were not domiciled in the UK. Baker & McKenzie, for example, were concerned that *“Should foreign courts not be prepared to recognise such judgments as binding on potential claimants who did not actively participate in the claim (but did not formally opt-out), defendants risk being forced to engage in litigation twice and, if unclaimed damages have not reverted to the defendant, being forced to pay for the same damage twice.”* Others noted that should the opt-out aspect of a claim be applied to the entire global class, businesses could be exposed to a disproportionately large liability as a result of a UK action.

### Damages

- 5.39. The great majority of respondents agreed that treble damages should not be allowed in collective actions. In the words of Cleary Gottlieb Steen and Hamilton, *“we believe that treble or punitive damages should continue to be prohibited. In particular, we agree that it is unfair for a company to be pushed into settling for fear of treble damages where, as is normally the case in litigation, it is not certain of being able to successfully defend the claim.”*
- 5.40. Some observed, citing the recent ‘Cardiff Bus’ case<sup>12</sup> that exemplary damages were currently available in the CAT, and a small number of these considered that, in the words of the CLA, *“we feel on balance that it is better to avoid adopting exceptional rules for antitrust actions, relying instead on case law”* (although they did not support treble damages).

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<sup>12</sup> <http://www.catribunal.org.uk/238-6946/1178-5-7-11-2-Travel-Group-PLC-in-liquidation.html>

### Loser-pays

- 5.41. The great majority of respondents agreed that the loser-pays rule was an important safe-guard and a core principle of the English legal system. The London Solicitors' Litigation Association, for example, argued strongly in favour of maintaining the loser-pays rule saying that *"Claimants who pursue unfounded claims should be at risk of paying the defendants' costs, in the same way that defendants who resist settling good claims should be at risk of paying the claimants' costs."*
- 5.42. As to whether the loser-pays rule should ever be departed from, there was a degree of variation in the responses. The majority considered that the court should have the discretion to depart from the loser-pays principle in the appropriate circumstances, but the majority of these also considered that circumstances should be rare. The ICC said *"We consider that cases cost-capping may only be appropriate in truly exceptional cases,"* whilst Ashurst noted that *"it is important to remember that claimants can seek ATE insurance to assist with the adverse costs risk."* Although a small number of respondents suggested new procedures – Consumer Focus, for example, suggesting that *"a written agreement of how damages will be distributed should be signed at the outset"*, the majority of respondents set out similar views to those expressed by the Law Society of England and Wales when they observed that *"We do not however consider the CAT would require any special costs rules for these situations, as it already has amply-developed costs principles governing them."*

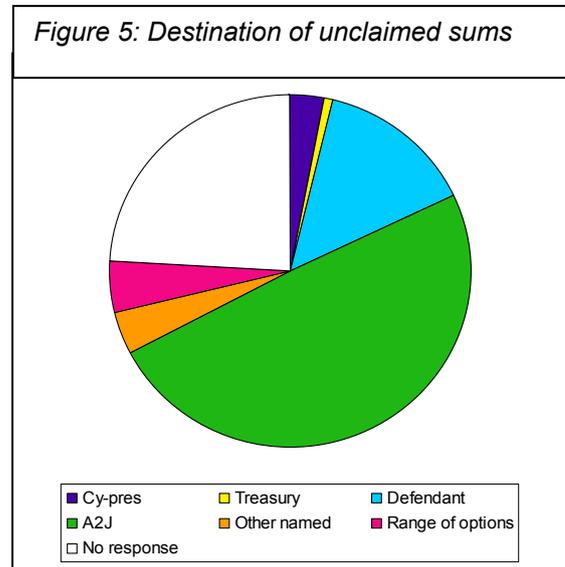
### Contingency Fees

- 5.43. In the words of the University of East Anglia, *"The key concern for a collective action is the funding thereof."* There was therefore a significant debate on whether or not contingency fees should be allowed if opt-out collective actions are introduced.
- 5.44. The majority of respondents considered that they should not be allowed, arguing, with the Competition Law Association, that *"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."* Some respondents did, however, argue that if contingency fees were not allowed, there would need to be some other method of funding claims, such as the use of conditional fees.
- 5.45. Other respondents argued that the concerns set out in the Government's consultation were *"misconceived"* (Rachael Mulheron and Vincent Smith) and that, in the words of Firstassist Legal Expenses Insurance Limited, *"the more funding options available to a Claimant the greater the prospect of effective private sector challenges to anti-competitive behaviour. A number of respondents also commented on the changes that the Jackson Reforms, as implemented*

in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, would have a bearing on funding, given that the Act makes provisions for contingency fees and placed limits on the use of conditional fees and after the event insurance.

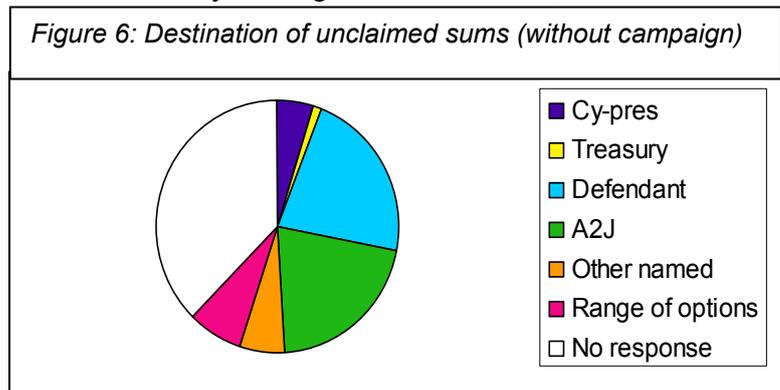
Unclaimed sums

5.46. The question of what to do with unclaimed sums was one that divided respondents. As Figure 5 indicates, the majority of those who responded on this issue favoured distributing the funds to the Access to Justice Foundation (ATJF). Approximately two-thirds of those who favoured this option were local or regional organisations who thought highly of the AtJF’s work and who only answered Questions 20-21.



5.47. Arguments put forward by these respondents (most of whom responded using identical language) included that it would avoid “*the associated lobbying of judges and potential satellite litigation*”, that “*A full deterrent effect against anti-competitive companies is achieved as companies practising such behaviour*” and that “*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.*” They further argued that the AtJF “*has a trusted role in the advice sector and legal profession*” and “*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.*”

5.48. Leaving aside those organisations who sent the same response, Figure 6 shows that distributing the funds to the AtJF remained the single most favoured option. The Law Society of England and Wales, for example, said “*We strongly agree that the Access to Justice Foundation would be the most appropriate recipient*”, though also said that “*Defendants should however be free to settle (and have settlement approved*



*by the CAT) on a reversion to the defendant basis as otherwise incentives to settle would be distorted.*" A small number of respondents asked whether the AtJF could operate in Scotland and Northern Ireland, as well as England and Wales.

- 5.49. Reversion to the defendant was also favoured by a significant number of respondents, many of which were respondents opposed to the introduction of an opt-out regime but considered that, if one were to be introduced, reversion to the defendant would be a necessary safeguard. Herbert Smith argued that "*An opt-out action combined with any option for the distribution of unclaimed funds other than reversion to the defendant would in our view cross the line from compensation to punishment*" whilst the City of London Law Society considered that the other options would "*[result] in an unjustified windfall to the Access to Justice Foundation or other specified body*".
- 5.50. A small number of respondents supported allocating the funds to another named charity, with the University of East Anglia suggesting that "*it may be that a new body would have to be set up*" with a remit that should be "*broad enough to include competition advocacy and education, as well as research funding*". A similarly small number also supported allocation by *cy-près*, or argued that all options should be available at the CAT's discretion so that, in the words of Rachael Mulheron and Vincent Smith, "*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.*" One respondent, Orrick, Herrington and Sutcliffe (Europe), considered that any unclaimed funds should be given to the Treasury.

### Settlement

- 5.51. Some respondents highlighted the issue of settlements, suggesting that, in order to ensure fairness for the underlying claimants, any settlement concluded on an opt-out basis would need to be judicially approved. In the words of Rachael Mulheron and Vincent Smith, "*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.'*" Concerns were also raised as to whether the underlying claimants would have the opportunity to opt-out from a settlement and whether settlements could lead to a disproportionate sum of money being paid to legal advisers.

### **The Government's Decision**

- 5.52. The Government recognises that opt-out collective actions are novel, which is why the actions are limited to competition cases – where many claims, particularly those brought on behalf of consumers, cannot be

effectively brought in any other way – and will be heard only in the CAT, a specialist tribunal.

- 5.53. The Government also firmly agrees that strong safeguards are critically important to an opt-out collective actions regime. It has therefore decided **to establish a range of safeguards within the collective actions regime to protect against frivolous or unmeritorious cases being brought.**

#### Certification

- 5.54. The Government strongly agrees with the great majority of respondents that a certification regime is an important safeguard. It welcomes the consensus that the issues identified in the consultation are broadly correct and thanks those who raised new issues.
- 5.55. The Government has therefore decided that **there should be a strong process of judicial certification, including a preliminary merits test, an assessment of the adequacy of the representative and a requirement that a collective action must be the best way of bringing the case.**

#### Jurisdiction

- 5.56. The Government recognises that business would rightly have concerns if a claim could be brought against them in the UK courts on behalf of anyone in the world and that these concerns would be exacerbated if there was any risk of them paying compensation twice for the same offence. It notes that both the Civil Justice Council, in its Draft Court Rules for Collective Proceedings (2010) and the drafters of the Financial Services Bill (2010), proposed that foreign claimants would have to actively opt-in to a claim, rather than automatically being included. The Civil Justice Council noted in the Explanatory Notes to the Rules that these provisions “*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.*”
- 5.57. **The Government has therefore decided that the ‘opt-out’ aspect of a claim will only apply to UK-domiciled claimants**, though non-UK claimants would be able to opt-in to a claim if desired.

#### Damages

- 5.58. The Government strongly agrees that treble damages have no place within a UK collective actions regime and has therefore decided to **prohibit treble damages**. Recognising the concerns raised about exemplary damages and the wider concerns about the need for safeguards in collective actions, it has decided to **prohibit exemplary damages in collective actions.**

### Loser-pays

- 5.59. The Government strongly agrees that the loser-pays rule is an important safeguard in preventing frivolous or unmeritorious cases being brought. It agrees that it would normally be unfair if a defendant which wins a case had to pay its own legal costs – and equally, that a claimant which wins should be able to reclaim its costs.
- 5.60. The Government has therefore decided to **maintain the loser-pays rule and to explicitly clarify in the CAT Rules of Procedure that this should be the starting point for cost assessment by the CAT.**
- 5.61. The Government also recognises that whilst the loser-pays rule should be applied in the vast majority of cases, there may be exceptional circumstances in which it could be departed from, for example by cost-capping, in the interests of access to justice or to reflect the conduct of one of the parties. The Government agrees with the Law Society of England and Wales, and other respondents, who considered that the CAT's existing costs principles are already sufficient to cover such circumstances.

### Contingency fees

- 5.62. Prohibiting the use of damages-based agreements (DBAs), sometimes called contingency fees, was one of the key safeguards highlighted by many respondents as necessary to ensure that an opt-out collective actions regime did not lead to a 'litigation culture'. The Government agrees that this prohibition would be an important safeguard and that allowing DBAs could encourage speculative litigation, thereby placing unjustified costs on defendant businesses and creating an incentive for lawyers to focus only on the largest cases. No win no fee conditional fee agreements (CFAs) and after the event insurance will remain available for use in these cases, subject to the changes in the Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act 2012.
- 5.63. The Government has therefore decided to prohibit DBAs in collective actions cases in the CAT. This will require an amendment to the LASPO Act 2012 for this new type of case.

### Unclaimed sums

- 5.64. The question of where unclaimed sums should be paid was one of the more contentious design details, with a number of respondents arguing strongly in favour of different options. The Government remains of the view, as set out in the consultation document, that allowing cy-près would be undesirable, due to the fact that there would be frequently substantial difficulties in determining a suitable candidate for organisational distribution and that this in turn would likely lead to the

lobbying of judges and potentially also satellite litigation disputing the party chosen. Only a small number of respondents argued in favour of cy-près. The Government's position therefore remains that it would be preferable to allocate the funds to a named recipient, whether that be the Treasury, the defendant, the Access to Justice Foundation or another named charity.

- 5.65. The Government does recognise, however, that a settlement could potentially include cy-près elements (subject to the approval of the providing judge), providing that this was the most satisfactory way of ensuring that as many persons as have suffered loss received redress.
- 5.66. Although a number of respondents argued in favour of unclaimed sums reverting to the defendants, the Government remains unconvinced that the party who has been found to be in breach of competition law should be the one to benefit from an unjustified windfall. The Government also acknowledges that many respondents expressed strong opinions against escheat to the Treasury and that this option was supported by only one respondent. The Government does recognise, however, that a defendant who settles should be allowed to do so on a reversion to the defendant basis, as otherwise this could distort the incentives to settle.
- 5.67. The Government considers that it would be far better if the funds were used for some purpose connected to the underlying driver for allowing collective actions, such as restoring competitive markets or enabling access to justice.
- 5.68. The AtJF was recommended as a suitable body to receive residue funds from collective actions by the Jackson Review of Civil Litigation Costs and the Civil Justice Council. Furthermore, the strong grass-roots support received in the consultation from over forty local organisations bears strong testimony that the AtJF has an impact and is valued by those whom it exists to serve. The AtJF is used to dealing with uneven inflows of funds and, as a grant-giving organisation, does not directly fund legislation.
- 5.69. Although the AtJF currently operates only in England and Wales, as this is where its sources of funding come from, there is no bar to them operating in Scotland and Northern Ireland and they have informed the Government that they would be prepared to do so.
- 5.70. The Government has therefore decided that **any unclaimed sums must be paid to the Access to Justice Foundation, though leaving defendants free to settle on other bases, including on a cy-près or reversion-to-the-defendant basis, subject to approval by the CAT judge.**
- 5.71. However, recognising that this subject is one in which there are a wide variety of views, the **Government is minded, in any future legislation on this subject, to include an order making power that would allow**

**the destination of unclaimed sums to be altered at a future date, in response to evidence as to how the system is working.**

Settlement

- 5.72. The Government agrees with respondents that it is important to ensure fairness to the underlying claimants. Government has therefore **decided that any opt-out settlement must be judicially approved, with the approval including a consideration of the reasonableness of the fees being paid to legal representatives, and with underlying claimants given an opportunity to opt-out of the settlement.**

## 6 Encouraging Alternative Dispute Resolution (ADR)

### Summary of the Government's decisions

The Government has decided :

- **To strongly encourage ADR, but not to make it mandatory.**
- **To align the CAT Rules governing formal settlement offers (also known as Caldebank Offers) with those of the High Court.**
- **To introduce a new opt-out collective settlement regime for competition law in the CAT**, similar to the Dutch Mass Settlement Act (2005), to allow businesses to quickly and easily settle cases on a voluntary basis.
- **To enable the competition authorities, when a company has been found to have infringed competition law, to certify a voluntary redress scheme**, though not to enable them to impose one.

### The Issue and Proposals

- 6.1 The consultation posed a number of questions around ADR, and whether it would be a suitable complement to the court system. The court system is a lengthy and costly process, and may not always be the most appropriate method for consumers. Government proposals focussed on encouraging ADR and to ensure that the courts and OFT promote ADR wherever possible. The proposals included, whether mediation should be voluntary or mandatory, whether pre-action protocols should be introduced for competition cases in the CAT and questions around whether private companies would set-up their own ADR initiatives.

### Encouraging ADR

#### The Questions

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

#### Summary of Responses

- 6.2 The great majority of respondents who answered the questions on ADR were in favour of government adopting a voluntary approach rather than a mandatory approach.

- 6.3 As Hogan Lovell’s stated in their response: *“ADR offers the speed, low cost and low risk that litigation generally cannot. That said, it should not be made mandatory - there are occasions when one or other party needs to establish legal rights and obligations through the certainty of a court procedure, and it is essential that their right to do so is preserved.”* The Law Society of England and Wales echoed similar thoughts: *“we do not consider that collective consensual dispute resolution should be a mandatory step before a collective redress action. The freedom to bring a case to court is fundamental and parties should not therefore be bound to participate in a dispute resolution scheme.”*
- 6.4 On further points, Olswang LLP commented that if ADR became more common, then there may need to be attempts to monitor the quality: *“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.”* Simmons and Simmons also raised concerns about the effectiveness of multiparty mediation.

### The Government’s Decision

- 6.5 The Government recognises the strong arguments for not introducing a mandatory system of ADR. The Government is not making ADR mandatory as it would be too restrictive for ADR to be prescribed as a default route before collective actions can be undertaken and could also undermine the basic right of parties to take matters to court. **Government is therefore going to encourage collective actions but not make it mandatory.**

## Pre-action protocol

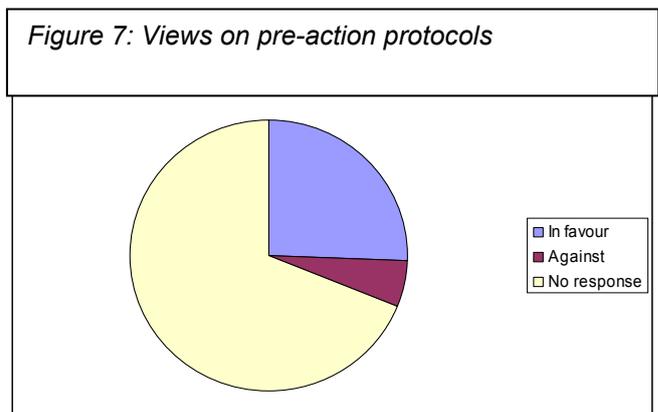
### The Questions

**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?*

### Summary of Responses

- 6.6 The majority of respondents who answered this question were broadly in favour of some level of pre-action protocol in competition cases. There was some variation in the responses

Figure 7: Views on pre-action protocols



as what would be the most appropriate type of pre-action protocol. Two respondents, Addleshaw Goddard, and Freshfields Bruckhaus Deringer, suggested that a pre-action protocol should mirror the Civil Procedure Rules of the High Court (CPR). Under Practice Direction on Pre-Action Conduct, ADR should be considered before undertaking proceedings.

- 6.7 However, many respondents also raised concerns about the threat of ‘torpedo litigation’. Under European legislation, once a case has been started in one member state, it cannot be started in a second member state. The concern amongst several respondents is that once pre-action protocols are started then the alleged infringing party will start court action in a second member state. The Law Society of England and Wales state this as being the key decision as not to support pre-action protocols: *“The Society is generally very supportive of the use of pre-action protocols in civil justice proceedings... The Rubber follow-on cartel damages case established the ability for defendants to start an action in another EU jurisdiction before proceedings had been issued by the claimant in the relevant domestic court... We would therefore oppose the mandatory use of pre-action protocols (i.e. with penalties for non-compliance) or pre-proceedings ADR in this instance.”*
- 6.8 One possible solution, as proposed by Slaughter and May, Norton Rose and Baker and McKenzie LLP, is for Government to encourage the use of pre-action protocols. In effect, the protocols should not be mandatory to follow, but rather suggested steps that could be made. A second solution, as suggested by the UK Competition Law Association, is for a ‘post-action’ protocol: *“...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.” Hausfield LLP suggested a similar post-action protocol, with the emphasis being on a stay of proceedings: *“This would set out a procedure to be followed after the claim form is filed and served on the defendants, and would involve the proceedings being stayed. This would ensure that there is no risk of an Italian torpedo but would also allow for the claimant and defendant to disclose documents, discuss the claim and attempt to settle before proceeding to court.”*

## The Government’s Decision

- 6.9 The Government is keen for businesses and consumers to try and resolve cases through ADR, and one possible method of promoting this is through pre-action protocols. There are legitimate concerns that implementing pre-action protocols could harm the strength of the ADR

regime by stimulating companies to begin legal action in other member states.

- 6.10 Various respondents have proposed possible solutions; however, it is clear that this is a complex issue and one that could be addressed through guidance once the core reforms have been established. The Government **has therefore decided not to take forward any proposals in this area**. The CAT may choose, however, to issue guidance about this subject once any legislative reforms have taken place.

## Formal settlement offers

### The Questions

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

### Summary of Responses

- 6.11 The great majority of respondents to this question supported the alignment of the CAT rules governing formal settlement offers (also known as Caldebank Offers) with those in the High Court. The London Solicitors Litigation Association said “*we see benefit in aligning the rules on formal settlement procedures between the CAT and the High Court.*” The CBI said simply “*support*”.

### The Government Decision

- 6.12 It is clear that the current CAT Rules make it more difficult for litigants to reach settlements, compared to the rules that exist in the High Court. The Government agrees with the great majority of respondents and **has therefore decided to align the CAT Rules governing formal settlement offers (also known as Caldebank Offers) with those of the High Court.**

## Further encouragement of ADR

### The Questions

*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?*

## Summary of Responses

- 6.13 On this question, most of the respondents were of the opinion that whilst Government ought to encourage ADR, they themselves would not be increasing the range of, or creating new, initiatives. Most of the respondents were along the lines of Baker McKenzie's response: "*As a law firm that has long espoused the virtues of ADR, we would expect to recommend involvement in such initiatives to our clients but it is unlikely to be appropriate for us to establish the initiatives ourselves.*" Both Albion Water and Slaughter and May responded along the same lines. Some respondents, such as the CBI, proposed ADR initiatives that appeared to be for the Government, rather than for themselves, to set up.
- 6.14 The notable exception to this view came from Commercial Litigation Funding Limited who stated that: "*In the event that all these measure were introduced then A2J [Access to Justice], through its subsidiaries would expect to facilitate a number of initiatives to enable claimants to bring their cases individually or more likely, collectively.*"

## The Government's Decision

- 6.13 **Government has no firm proposals in this area, but continues to welcome and encourage organisations to design initiatives that would encourage ADR.**

## Collective settlement

### The Questions

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

## Summary of Responses

- 6.15 In the consultation, the Government opined that, notwithstanding the success of the Dutch Mass Settlement Act (2005), introducing a right to bring opt-out collective actions would obviate the need to introduce a separate procedure for opt-out collective settlement. The majority of respondents who commented on this matter agreed with the Government, though with varying degrees of certainty: the British Bankers' Association, for example, said "*This would appear to be the case – though it is not entirely clear.*"

- 6.16 Some respondents, disagreed, arguing in detail that an opt-out collective settlement procedure would be a valuable complement to an opt-out collective action regime and that, furthermore, one that could be introduced relatively simply and with little cost. Freshfields Bruckhaus Deringer, for example, stated that *“there is a pressing need for provisions governing collective settlement. Many defendants want the ability to make an offer and achieve closure in respect of their liability before litigation commences and which, if accepted by the claimants, will be binding”* whilst Fairgreaves et al stated strongly that *“it seems contrary to policy to oblige people to bring litigation (if the proposal were to become legislation, adopting an opt-out claim basis) if a consensual solution is available commercially but would be assisted by a legal framework and procedure to make it effective.”*
- 6.17 The CBI, whilst it did not support an opt-out collective actions regime, argued instead that the Government’s policy should focus more heavily on ADR, arguing that businesses *“businesses can be incentivised to participate in ADR”* and that *“there needs to be a new mechanism by which a court could approve a collective settlement entered into by a company.”* The latter half of this position was echoed by Fairgreaves et al, who suggested that *“There are also reputational advantages for a corporation in recognising voluntarily that mistakes have been made in the past and agreeing to a procedure whereby amends are made to persons who may well constitute a significant part of their current and future customer-base”*.

### **The Government Decision**

- 6.18 Notwithstanding its initial position, the Government has listened to the cogent and well-argued submissions made by those who considered that an opt-out collective settlement procedure would be a valuable complement to an opt-out collective actions regime. It recognises that some businesses will, for reputational or other reasons, wish to make redress to their customers and agrees with the CBI and others that those who wish to do so should be given the support they need to do so.
- 6.19 The Government considers that ADR should be strongly encouraged and that the ability to reach a binding settlement would help businesses to draw a line under an issue, both reputationally and financially, as well as benefitting those which had suffered loss. It agrees that it would be perverse to require a company to effectively invite someone to sue them in order to reach a settlement and, further, as stated in the consultation, that if a collective settlement was to be binding on an opt-out basis then this would need to require court approval: a system cannot allow a third party to agree a settlement on behalf of others without judicial oversight or check.

- 6.20 The Government has therefore decided **to introduce a new opt-out collective settlement regime for competition law in the CAT**, similar to the Dutch Mass Settlement Act (2005), **to allow businesses to quickly and easily settle cases on a voluntary basis.**
- 6.21 Under this system a representative of those who believe they have suffered a loss as a result of an infringement of antitrust rules and a potential defendant would jointly apply to the CAT to approve on an opt-out basis a mutually agreed settlement agreement. It would also in principle be possible for a defendant to settle with multiple representatives, each representing different categories of claimants (e.g. direct and indirect purchasers) simultaneously. As with the collective actions regime, the ‘opt-out’ nature of a settlement would only apply to UK-domiciled claimants, though claimants outside the UK could opt-in if desired.
- 6.22 The CAT would need to certify that the case was suitable for such a settlement, which would be similar to the certification required for a collective action, though without the need for a superiority or merits test (given that the settlement would be consensual).
- 6.23 The CAT will then need to approve the settlement itself, to ensure that it is ‘fair, just and reasonable’; in other words, does it give satisfactory recompense to those who have suffered loss, taking into account both the degree of loss alleged and the likelihood of a collective actions claim succeeding (were it to be brought in absence of settlement). The CAT will also need to be satisfied that the proposed agreement would be the most satisfactory way of ensuring that as many members of the identifiable class as possible receive redress.
- 6.24 For the purpose of approving the settlement, the CAT will be able to take into account any information it considers relevant, including representations made by the representative and the defendant or by third parties. The CAT will be able to hold a hearing to determine the approval of the settlement agreement and to appoint an expert for the purpose of assisting the CAT to make its decision.
- 6.25 Once a settlement is approved, the CAT will be able to issue any directions it considers appropriate regarding the settlement mechanics and procedure. Such directions will set the time within which those who fall within the identifiable class may opt-out of the settlement. The directions may also require the defendant to distribute the compensation in a certain way (for example, to be held on trust by the representative or a third party on behalf of those who subsequently come forward to claim it, or that the alleged infringer credits store cards of those who subsequently come forward to claim the compensation under the settlement agreement), or impose requirements on the representative and/or the alleged infringer to take certain to ensure that as many of the “identifiable class” as possible had been made aware of the settlement proposal and of their ability to opt-out if desired.

6.26 The Government believes that an opt-out collective settlement regime has the potential to offer real benefits to both claimants and defendants. From the perspective underlying claimants/potential underlying claimants, an opt-out collective settlement mechanism would clearly facilitate the granting of compensation without the additional costs, risk and time consumed in lengthy court cases. It will help to ensure that those who have suffered loss are able to get redress as quickly, will minimise the costs to business and help to ensure that litigation is the option of last resort.

## Certification of Redress Schemes

### The Questions

**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?*

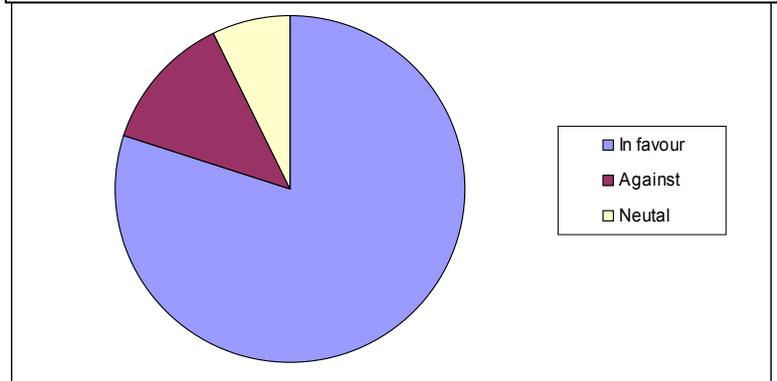
### Summary of Responses

#### Mandatory imposition or certification of redress schemes

6.27 The great majority of respondents who responded to this question supported some role for the competition authorities in establishing a redress scheme (please see figure 8).

6.28 The respondents that were keen for the OFT to not be involved in a redress scheme expressed concerns about breaching the boundary between public enforcement regimes, and the ability of the individual to seek private redress. Such a point was highlighted by the International Chamber of Commerce in their response who stated that *“the public and private enforcement regimes should remain separate.”*

Figure 8: Views whether the OFT should be involved in a redress scheme

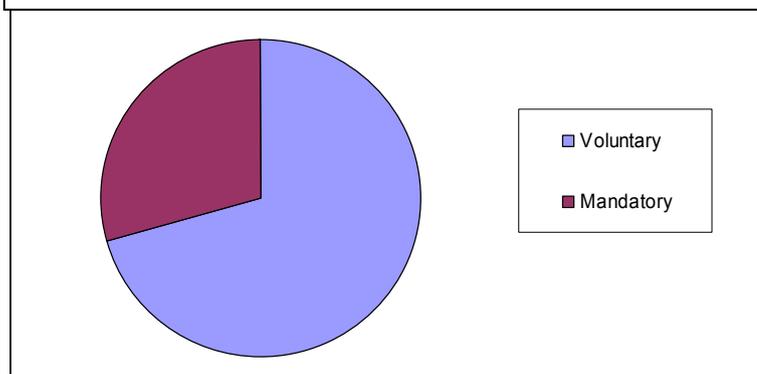


6.29 Of the respondents who were in favour of some form of redress scheme, the majority were in favour of a voluntary redress scheme with a role for the OFT in certifying the scheme, the majority were in favour of a voluntary rather than a mandatory certification scheme (please see figure 9).

6.30 The debate on voluntary and mandatory schemes focussed around whether the OFT should have the power to force companies to offer redress. In its response, the UK Competition Law Association highlighted the need for a redress scheme to be offered voluntarily as it should not be imposed on an “unwilling cartel.”

Respondents highlighted various concerns about creating a mandatory regime as the primary role of the OFT will be on enforcing the competition regime, and that the role of certifying redress schemes will be an additional duty. Herbert Smith concluded that the competition authorities should not “...be directing time and resources away from its enforcement role into a role which it is not designed or suited for.”

Figure 9: Views on whether a redress scheme should be voluntary or mandatory



6.31 An alternative option, to either options in the consultation, as proposed by Which? and the Law Society of England and Wales is that a mandatory scheme be adopted as an option of last resort: the scheme would be a method of encouraging businesses to offer voluntary redress schemes.

6.32 Some respondents also questioned whether the OFT would have the necessary expertise to carry out this role. Hogan Lovells argued that: “We also consider that OFT is not suitable equipped to deal with these issues.” Slaughter and May thought that the CAT would be “...better placed and equipped to apply the necessary scrutiny to such schemes.”

#### Possible reduction in fine

6.33 The great majority of respondents to this question were in favour of some form of possible reduction in fine. Those in favour of a reduction in fine, typically used the same line as Edwards Wildman, who stated in their response: “If the OFT has the power to certify a voluntary redress scheme, it would also be appropriate to incentivise voluntary redress through a small reduction in fine.”

6.34 Most respondents who were in favour of a reduction in fine thought that a reduction of 5-10% would be appropriate, as is currently offered by the OFT. Hogan Lovells thought that a small reduction in the level of the fine

might even encourage the development of the private enforcement regime: *“Although there may be some practical difficulties in doing so, a means by which compensation offered or paid by parties prior to an infringement decision is reflected in the penalty imposed, would encourage private settlements, and would represent a positive means by which the public enforcement regime could be used to develop the private enforcement regime.”* The Faculty of Advocates, on the other hand, argued: *“We do not think that compensation to ‘victims’ and penalty for breach of legislation should be connected in that way.”*

## The Government’s Decision

### Mandatory imposition or certification of redress schemes

6.35 The Government considers that the primary duty of the OFT will be to enforce the competition regime and undertake studies and investigations in the competition regime. Any work therefore that the OFT will undertake on redress schemes would be in addition to this primary competition work, and should not be a substantial burden on resource.

6.36 The Government is therefore concerned that if the OFT was given a power to require a business to create a redress scheme, then this would be too great a burden for the OFT. Due to the reluctance of the company, the OFT would automatically become involved in the intricate detail of a scheme. The imposition of a scheme would be very likely to be contested, which could involve the OFT in lengthy appeals.

6.37 Allowing redress schemes to be imposed would also run counter to the wider Government objective is for ADR to be a voluntary process.

### **6.38 The Government will therefore give the OFT the discretionary power to certify a voluntary redress scheme, but not to impose one.**

6.39 The OFT would certify that a voluntary redress scheme put forward by a business has been created in accordance with a reasonable process. It is important to note that the certification will be in respect of the process followed, as opposed to whether the amount of compensation is reasonable.

6.40 The precise process that would be followed would be defined by Order, but would be likely to include:

- The process of determining the redress scheme to be overseen by an independent panel, which would include the necessary economic, legal and accounting expertise.
- Plans as to notify consumers of the existence of the scheme.
- The scheme being easy to follow and understood, including details of how consumers will be notified of the scheme.

- The scheme to have an independent appeals process to an independent person or body within the auspices of the scheme to resolve disputes with possible claimants.

6.41 The effect of certification would be that the scheme becomes legally binding in the sense that the CMA \ OFT and a beneficiary who chooses to receive compensation under a voluntary redress will be able to take statutory enforcement action against a business which fails to comply with the terms of the voluntary redress scheme. Furthermore, certification should also encourage potential beneficiaries to conclude that the scheme will offer a fair level of compensation as the OFT \ CMA will have concluded it was created in accordance with a reasonable process.

#### Who can certify schemes?

6.42 Government has also considered whether or not to grant the ability to certify schemes to the sector regulators in addition to the OFT. The sector regulators have specific knowledge of their markets will have also handled cases where a redress scheme has now been proposed.

6.43 However, it is unlikely that the sector regulators will handle redress cases that often. In consequence they would have to relearn the process every time they looked at a scheme. Furthermore, the certification is not about certifying the amount; it's about certifying the process that the business followed. This therefore reduces the need for the sector specific knowledge. **The Government has therefore decided that the power to certify redress schemes will only be given to the OFT.**

6.44 The Government has also decided that the ability to certify schemes will apply to any business in so far as it operates in the UK, regardless of whether or not the business was found in breach by a UK competition authority or the European Commission. In practice, a business is likely to only offer a redress scheme to UK consumers if there are a large number of consumers affected.

#### Possible reduction in fine

6.45 The Government agrees with the majority of respondents that the possibility of a small reduction in fine could help to incentivise businesses to offer a redress scheme. In accordance with its current guidance, the OFT can already consider, on a discretionary basis, whether to offer a reduction of 5-10% in the level of fine where a business has made redress. This should continue to be the case and voluntary redress schemes of the type discussed above would come within the scope of that guidance.

6.46 **Government believes that those who offer a redress scheme could qualify for a possible reduction of fine, in accordance with the OFT's current guidance.**

## 7 Complementing the Public Enforcement Regime

### Summary of the Government's decisions

The Government has decided:

- **Not to take domestic action in this area as the European Commission is expected to bring forward proposals within the next few months.** If the Commission's proposals are significantly delayed then the Government will consider bringing forward our proposals.
- **To help ensure that consistency is maintained between the CAT and the CMA, by:**
  - **Amending the CAT Rules to provide that it is required to notify the CMA when private actions cases are initiated.**
  - **Amending the CAT Rules to provide an explicit power for the OFT/CMA to act as an intervener, where appropriate, in private actions cases.**
  - **Ensuring the CAT has the power to stay cases being investigated by a competition authority.**

### The Issue and Proposals

- 7.1 The consultation considered the interaction between public and private enforcement, recognising the importance of ensuring that an increase in the number of private cases did not undermine the role played or the tools used by public competition authorities and that the law was interpreted consistently by the competition authorities and the courts and CAT. Options considered included measures to protect the leniency regime by exempting leniency documents from disclosure and removing joint and several liability from immunity recipients, as well as mechanisms to facilitate the OFT or CMA's interaction with the CAT.

### Protecting the Leniency Regime

#### The Questions

**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?*

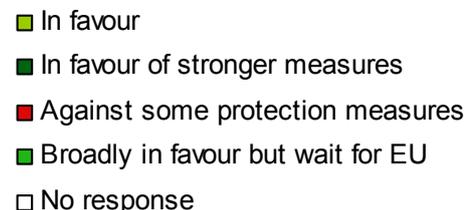
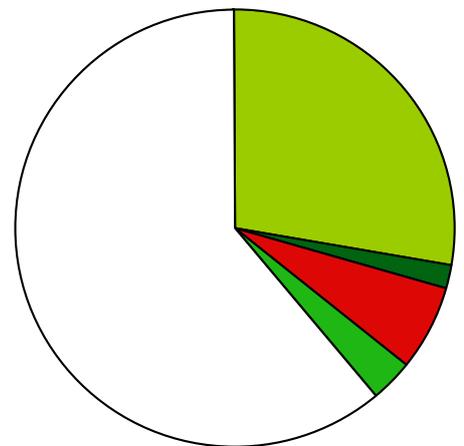
## Summary of Responses

7.2 The great majority of the respondents who commented on these questions agreed with the view expressed in the consultation that there would be a need to introduce measures to protect the public enforcement regime (see figure 10); however, there were some differences of opinion as to what measures would be most appropriate.

7.3 The fact that the additional exposure to private actions could

deter leniency applicants was acknowledged by almost all respondents who commented on these questions as, in the words of Eversheds LLP, “*third party damages claims may represent a significantly larger financial liability than any reduction in fine received from the regulator*”. As indicated in the consultation, given the highly secret nature of cartels, any reduction in the incentives to come forward could have a damaging impact on the public enforcement regime and the overall detection and deterrence of anticompetitive behaviour. A few respondents, such as the Centre for Competition Policy at the University of East Anglia, observed that this would even operate to the detriment of private sector claimants: because follow-on cases rely on prior infringement decisions, “*the short term gain of private access to these documents would be outweighed by the long-term loss, namely, the decreasing detection rate.*”

Figure 10: Views on Protecting the Leniency Regime



7.4 The great majority of respondents supported the protection of leniency documents, with the great majority of these considering that this should apply to all leniency recipients, regardless of whether they had received full immunity as whistleblowers or only a more limited reduction in the fine. Some respondents emphasised that only documents created for the purpose of leniency should be protected, not pre-existing documents that might have been submitted alongside the leniency application. A few respondents suggested that whether or not disclosure should occur should be left to the discretion of the CAT, whilst others observed that the current situation, in which national courts had discretion, created uncertainties for business. Those few

respondents who opposed the protection of leniency documents often emphasised the importance of ensuring that leniency applicants remained liable for the damage caused by their wrongdoing, with some suggesting that instead, the existence of leniency documents could be taken into account in the judgement or settlement, or that leniency applicants could reclaim damages from their co-infringers.

- 7.5 Responses were more mixed with respect to the removal of joint and several liability from immunity recipients, though the majority continued to support the proposal. Some respondents highlighted that, in cases where other cartelists had gone bankrupt, this could result in a risk that claimants would not be able to recover their full losses; other respondents raised the issue of fairness towards other members of the cartel, such as Herbert Smith who stated *“risks of unfairness also arise for the other participants in the cartel, who may end up being penalised, and where there may be an issue of proportionality where the leniency recipient is the largest supplier.”* A few respondents also went further than the Government’s proposals, such as Hausfeld & Co LLP who felt that, *“the whistleblower should be protected, not only from joint and several liability, but from being pursued in contribution proceedings and against interest also, where appropriate. This would protect whistleblowers and act as an incentive to come forward.”* The majority of respondents emphasised that there should be a distinction between immunity applications and other leniency applicants, with the latter not being protected from joint and several liability.
- 7.6 Although the great majority of respondents agreed with the need for action in this area, some respondents observed that action at EU level would help ensure consistency across Member States and be more effective and suggested that BIS should wait to see what proposals were brought forward by the European Commission before taking action. This was true with regards to both protecting leniency documents and removing joint and several liability from immunity recipients, but was particularly emphasised in the case of the latter as, in the words of the City of London Law Society, *“there would be limited value in protecting a leniency applicant from joint and several liability in the UK if it could still be held jointly and severally liable in proceedings in other Member States.”*

## **The Government’s Decision**

- 7.7 As stated in the consultation, the OFT’s leniency programme (and that of the European Commission and other EU National Competition Authorities) is an essential tool in the investigation of cartels. The possibility of leniency significantly increases the likelihood of detection - and ultimately prevention - of cartel conduct. This can also directly benefit private claimants, as follow-on actions rely on the detection of anticompetitive behaviour by the competition authorities in order to proceed. The Government therefore considers it important that the

reforms to private actions do not inadvertently undermine the leniency regime.

- 7.8 The Government recognises that this is an issue that affects countries across the EU. The question of whether companies can be forced to release leniency documents for use against them in court was tested in the *Pfleiderer*<sup>13</sup> case, showing that access to them is permitted; wider questions of access to documents were exposed in recent cases on hydrogen peroxide and gas insulated switchgear<sup>14</sup>, in which the General Court struck down decisions of the Commission refusing access to documents. In May 2012, the European Competition Network of competition authorities issued a joint statement asserting that *“leniency materials should be protected against disclosure to the extent necessary to ensure the effectiveness of leniency programmes.”*
- 7.9 Recognising that the great majority of respondents supported measures to protect the leniency regime, the Government also acknowledges the concerns expressed by those over unilateral action, particularly in the area of joint and several liability. The Government recognises that this is an area where action at European level would be preferable, both for reasons of consistency and effectiveness, as well as in terms of providing certainty for those considering applying for leniency. A discretion on the court to exclude leniency documents from inspection may not achieve the policy objective articulated of preserving leniency incentives, since it could create uncertainty and in the event may not provide any greater protection than does the existing case law.
- 7.10 In June 2012, Commissioner Almunia said, *“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.”*<sup>15</sup> The Government supports this objective.
- 7.11 The Government considers that any such legislation should be tightly focused: the primary objective should be to ensure that leniency applicants should be no worse off when facing private actions for damages than those who do not apply for leniency, not necessarily to offer them additional protection from making redress to those who have suffered loss. Furthermore, any overbroad exclusions from disclosure might be incompatible with EU law in view of the principles articulated in *Crehan* and *Pfleiderer*. Within context, the Government suggests that legislation may consider:

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7.1 <sup>13</sup> *Case C-360/09 Pfleiderer AG v Bundeskartellamt, judgment of 14 June 2011.*

<sup>14</sup> *Case T-437/08 CDC Hydrogene Peroxide v Commission and Case T-344/08 EnBW Energie Baden-Württemberg AG v Commission*

<sup>15</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/428>

- a. Providing that no party in civil proceedings should be required to produce leniency documents for inspection or use in the proceedings, without the consent of the leniency applicant.
- b. Providing that in civil proceedings no reliance may be placed on leniency documents, without the consent of the leniency applicant.
- c. Protecting immunity beneficiaries in cartel cases from being jointly and severally liable for damages awarded in any civil proceedings for damages.

The term 'leniency document' would mean any document to the extent that it contains information created solely for inclusion in or support of an application for leniency to the European Commission or an EU National Competition Authority or to the OFT for a no-action letter for an offence under section 188 of the Enterprise Act, not pre-existing documents that might have been submitted alongside the leniency application.

- 7.12 Should the European Commission decide not to bring forward such legislation, or should the European legislation not offer the necessary protections, the Government will consider further whether it would be desirable to legislate at national level to protect the leniency regime.

## **Wider interactions between public and private enforcement**

### **The Questions**

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

### **Summary of Responses**

- 7.13 Whilst the great majority of respondents agreed that private actions could complement public enforcement, there were different views as to how this should occur and what the respective roles of the two parts of the system should be.
- 7.14 Some respondents saw a very clear distinction between the two, with private actions strictly focused on redress and public enforcement on deterrence. In the words of the Competition Law Association, *"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.”*

- 7.15 Other respondents saw a greater overlap between the two functions. The City of London Law Society stated that, *“an extended role for private actions, under which private actions could be brought by both individuals and businesses, in both stand-alone and follow-on cases, could potentially complement the deterrent effect of financial penalties imposed by the OFT.”* Other respondents, whilst they supported a more holistic approach, saw this as being best deliverable by the public authorities taking on a greater role in delivering redress, arguing, to quote Professor Christopher Hodges, that *“Public agencies that are responsible for enforcement of non-competition law are now achieving payment of restorative compensation very quickly indeed, and at low cost and with great efficiency in terms of public resource and expenditure. Such approaches avoid any need for private enforcement in relation to damages.”*
- 7.16 Regardless of their position on the exact role of private actions, the majority of respondents favoured a continued central role for the public competition authority. In the words of the Law Society of England and Wales, *“we reiterate that the OFT should maintain its prominent role in enforcement.”* Some respondents, in particular the OFT, emphasised the need, if increasing numbers of private cases went to the court or CAT, to ensure that consistency was maintained between public authority and court decisions, so that *“possible discrepancies between guidance and decisions issued by the national competition authority and judgments of the courts are avoided”*. The University of East Anglia echoed this concern, stating that *“The CMA must have the ability and means to monitor what cases are going through the courts and the CAT and the ability to provide advice as a friend of the court through amicus briefs.”*

## **The Government’s Decision**

- 7.17 As stated in the Consultation Document, the Government considers that private actions can complement public enforcement, both by providing redress to those who have suffered loss and by adding to the deterrent effect on potential infringers. Whilst in some cases, such as a consumer collective action, the emphasis may be on providing appropriate redress, other parts of the reforms such as the reform of the CAT and the introduction of a fast-track for simpler cases will support growth by allowing businesses to more quickly and easily challenge anticompetitive behaviour. In some cases, private actors may be better placed to know where anticompetitive behaviour is causing them harm and will be best placed to weigh up the relative costs and rewards to them of pursuing an action.

- 7.18 The Government fully agrees that public enforcement must remain at the heart of the competition regime in the UK. The reforms currently being enacted through the Enterprise and Regulatory Reform Bill will create a strong and unified Competition and Markets Authority which will build on the success of the OFT and CC in ensuring that the UK continues to have a world class competition regime.
- 7.19 The Government recognises the importance of ensuring that consistency is maintained between the public and private parts of the regime. It is to no-one's interests if there is doubt as to what constitutes a breach of competition law or if different parts of the system provide contradictory rulings. To help ensure that consistency is maintained between the CAT and the CMA, the Government intends to:
- Amend the CAT Rules to provide that it is required to notify the CMA when private actions cases are initiated.
  - Amend the CAT Rules to provide an explicit power for the OFT/CMA to act as an intervener, where appropriate, in private actions cases.
  - Ensure the CAT has the power to stay cases being investigated by a competition authority.

## **8 Next Steps**

- 8.1 The majority of the proposed reforms will be subject to changes in primary legislation. Where this is the case, the reforms will be subject to Parliamentary timing and approval. The Government will work in parallel with the competition authorities and other stakeholders to implement those other reforms that do not require Parliamentary approval.

## 9 Summary of the Government's Decisions

The Government has decided:

### The Role of the Competition Appeal Tribunal

- To extend the CAT's jurisdiction to allow the CAT to hear standalone as well as follow-on cases.
- To enable the courts to transfer (standalone and follow-on) competition law cases to the CAT and vice versa.
- To enable the CAT to grant injunctions.
- To introduce a fast-track procedure for simpler competition claims in the CAT.
- To allow the CAT to award pro-bono costs.

### Collective Actions

- To introduce a limited opt-out collective actions regime, with safeguards, for competition law.
- That the CAT will be required to certify whether a collective action brought under the regime should proceed under an opt-in or an opt-out basis.
- That claims should be able to be brought either by claimants or by genuine representatives of the claimants only, such as trade associations or consumer associations, but not by law firms, third party funders or special purpose vehicles.
- To establish a range of safeguards within the collective actions regime to protect against frivolous or unmeritorious cases being brought, including: prohibiting treble or exemplary damages, applying the loser-pays rule in the assessment of costs and expenses and Prohibiting contingency fees.

### Encouraging Alternative Dispute Resolution

- To strongly encourage ADR, but not to make it mandatory.
- To align the CAT Rules governing formal settlement offers (also known as Caldebank Offers) with those of the High Court.

- **To introduce a new opt-out collective settlement regime for competition law in the CAT**
- **To enable the competition authorities, when a company has been found to have infringed competition law, to certify a voluntary redress scheme, though not to enable them to impose one.**

### **Complementing the Public Enforcement Regime**

- **Not to take domestic action in this area as the European Commission is expected to bring forward proposals within the next few months. If the Commission's proposals are significantly delayed then the Government will consider bringing forward our proposals.**

## **Annex A - The Consultation Questions**

### **The Role of the 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?**

**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?**

### **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.**

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

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

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

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

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

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

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

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

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

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

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

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

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

## **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.**

**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?**

## **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.**

## Annex B – Key Events

BIS Ministers and officials spoke about private actions at the following events. Ministerial attendance is explicitly indicated.

| Date         | Stakeholder/Event  |
|--------------|--|
| 9 May 2012   | British Institute of International and Comparative Law; Seminar on Private Actions in Competition Law    |
| 24 May 2012  | Confederation of British Industry Competition Panel; Discussion on Private Actions                       |
| 25 May 2012  | The Law Society of England and Wales; Competition Section Annual Conference 2012 (Minister Norman Lamb). |
| 31 May 2012  | International Chamber of Commerce; Worksop on Private Actions  |
| 15 June 2012 | University of East Anglia Centre for Competition Policy; Annual Conference 2012                          |
| 10 July 2012 | Competition Law Association; Seminar on Private Actions  |
|              |  |
|              |  |
|              |  |
|              |  |
|              |  |

## Annex C – List of Respondents

|   |   |
|---|---|
| 4 New Square  | Chartered Institute of Legal Executives   |
| Access to Justice Foundation  | Christopher Hodges (University of Oxford) |
| Addleshaw Goddard LLP   | Citizens Advice                           |
| Albion Water  | City of London Law Society                |
| Allen and Overy LLP   | CliEx Pro Bono Trust                      |
| American Bar Association  | Cleary Gottlieb Steen & Hamilton LLP      |
| Andreas Stephan (University of East Anglia)   | Clifford Chance LLP                       |
| Advice Centres for Avon   | CMS Cameron McKenna LLP                   |
| Advice Services Alliance  | Commercial Litigation Funding Limited     |
| Ashurst LLP   | Competition Appeal Tribunal               |
| Association of Independent Music  | Competition Commission                    |
| Avon and Bristol Law Centre (five responses from Beth Cooper, Clare Carter, Clovis Reese, Rolnan Mulqueeny and Will Stone). | Competition Pro Bono Scheme               |
| Bail for immigration Detainees  | Confederation of British Industry         |
| Baker and McKenzie LLP  | Consumer Focus                            |
| Bar Council   | Court of Session Judges                   |
| Bar Pro Bono Unit   | Covington and Burling LLP                 |
| Ben Sansum  | Cripplegate Foundation                    |
| Bournemouth and Poole Pro Bono  | Devereux Chambers                         |
| BPP Pro Bono Centre   | Devereux Chambers                         |
| Brighton and Hove Advice Strategy Society   | Duncan Fairgreave et al.                  |
| British Bankers' Association  | Eastern Legal Support Trust               |
| British Chambers of Commerce  | Edwards Wildman Palmer UK LLP             |
| British Retail Consortium   | Edwin Coe LLP                             |
| Cartel Damage Claims  | European Justice Forum                    |
| Centre 70 Advice  | Essex Street Chambers                     |
| Charles Russell LLP   | Eversheds LLP                             |
|   | Faculty of Advocates                      |
|   | Financial Services Authority              |

|  |  |
|--|--|
| Firstassist legal expenses insurance                                   | North East Legal Support Trust   |
| Freshfields Bruckhaus Deringer LLP                                     | North Kensington Law Centre  |
| GC100  | North West Legal Support Trust   |
| Greenwich Housing Rights   | Norton Rose LLP  |
| Guy Beringer   | Office of Fair Trading   |
| Hackney Community Law Centre   | Olswang LLP  |
| Hausfeld & Co LLP  | Orrick, Herrington & Sutcliffe LLP   |
| Herbert Smith LLP  | Open Source Consortium   |
| Hogan Lovells LLP  | Oxera  |
| International Chamber of Commerce                                      | Pannone LLP  |
| International Small Business Alliance                                  | Personal Support Unit  |
| Islington Law Centre   | Peter Whelan (University of East Anglia)   |
| Joint Working Party  | Public Law Project   |
| Judges of the Chancery Division of the High Court of England and Wales | Rachael Mulheron (Queen Mary University of London), Vincent Smith (Sheppard & Smith) |
| Knighton White   | RBB Economics  |
| Lambeth Law Centre   | Reaching Justice Wales   |
| Law Centres Federation   | Reed Smith LLP   |
| Law for Life   | RMI  |
| Law Society of England and Wales                                       | RWE NPower   |
| Law Society of Scotland  | Sheffield Community Law Centre   |
| LawWorks   | Sheffield Law Centre   |
| Legal Voice  | Simmons and Simmons LLP  |
| Linklaters LLP   | Skadden, Arps, Slater, Meagher and Flom LLP  |
| Lloyds Banking Group   | Slater and Gordon LLP  |
| London Solicitors Litigation Association                               | Slaughter and May  |
| Maclay Murray and Spens LLP  | Slough Immigration Aid Unit  |
| Midland Legal Support Trust  | South West Legal Support Trust   |
| Mihial Danov and Stephen Dnes (Brunel University)                      | South West London Law Centres  |
| Money Advice and Community Support                                     | Suzy Adcock (University of East Anglia)  |
| National Farmers Union   | St. Hilda's East Community Centre  |

The German Business  
Representation

Trading Standards Institute

Tunbridge Wells and District Citizens  
Advice Bureau

UK Competition Law Association

United Utilities Water

US Chamber Institute for Legal  
Reform

Welfare Rights and Money Advice  
Service

Which?

Wiltshire Law Centre

Withy King LLP

Zacchaeus trust

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