The City of London Law Society

4 College Hill
London EC4R 2RB

Tel +44 (0)20 7329 2173
Fax +44 (0)20 7329 2190
DX 98936 – Cheapside 2

mail@citysolicitors.org.uk

www.citysolicitors.org.uk

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The City of London Law Society

Competition Law Committee

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

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1. Introduction & executive summary

Background to the submission

1.1 This paper is submitted by the Competition Law Committee of the City of London Law Society ("CLLS") in response to the Department of Business innovation and Skills ("BIS") consultation paper entitled *"Private Actions in Competition Law: a Consultation on options for reform"*, published on 24 April 2012 ("the Consultation Paper").

1.2 The CLLS represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government Departments, often in relation to complex, multijurisdictional legal issues.

1.3 The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees.

1.4 The CLLS Competition Law Committee ("the Committee") has prepared this submission. The Committee is made up of solicitors specialising in UK and EU competition law in a number of law firms based in the City of London, who advise and act for UK and international businesses, financial institutions and regulatory and governmental bodies on competition law matters.

1.5 The authors of this response are:

Robert Bell, *Speechly Bircham LLP* (Chairman, Competition Law Committee)

Howard Cartlidge, *Olswang LLP*

Kim Dietzel, *Herbert Smith LLP*

Nigel Parr, *Ashurst LLP*

Richard Pike, *Baker & McKenzie LLP*

Michael Rowe, *Slaughter & May LLP*

1.6 We are grateful for the contributions of colleagues on the Committee.

Executive Summary

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

1.8 **Role of the CAT:-** Firstly, we concur with BIS that the competition law expertise and case management experience of the Competition Appeal Tribunal ("CAT") leave it better placed than other divisions of the High Court to handle increasing numbers of private competition law actions. We further welcome the proposal to permit "stand-alone" actions (i.e. without any regulatory infringement decision having first been handed down) to be brought before the CAT, as it avoids often complex questions as to which issues in a case relate to an infringement decision and which do not. The CLLS believes that within its expanded remit the CAT should also be empowered to grant injunctions as they represent a key remedy in competition law cases, especially where Small and Medium-sized Enterprises ("SMEs") are faced with foreclosure from a market owing to the abusive behaviour of a larger rival.

1.9 **SME Fast Track Procedure:-** The CLLS supports in principle the introduction of a fast track model for SME claimants. However it believes that it is important that the costs and damages incentives for claimants are appropriately balanced with adequate safeguards for the rights of the defence. Retaining a margin of procedural discretion for the CAT to vary timetables and cost caps will be integral to the successful implementation of the proposals. We believe the CAT chairmen must also be given wide discretion whether to allocate cases to the fast track but that careful consideration needs to be given as to whether it is appropriate to extend any cost capping beyond the interim injunction stage, to dissuade unmeritorious actions and prevent undue prejudice to non-SME companies.

1.10 **SME Access to Justice:**- In broad terms, the CLLS believes that the combination of the introduction of the SME fast track procedure and bolstering collective actions, together with promoting the increased use of Alternative Dispute Resolution ("ADR") (especially through the use of collective redress settlements) will provide improved access to justice for SMEs in competition law cases.

1.11 **Rebuttable Presumption of Cartel Losses and Passing On:-** Whilst a rebuttable presumption of loss in cartel cases would clearly benefit claimants and in theory encourage meaningful settlement discussions, the CLLS does not believe that such a presumption is appropriate in practice. In any event, the questions of whether and how to legislate on a possible "passing on" defence would need to be addressed before introducing a presumption of loss. The CLLS agrees with BIS that these would be best addressed at a European Union level.

1.12 **Approach to Collective Actions:-** We do not believe the system itself is fundamentally responsible for the lack of collective actions being brought. Whilst we recognise that an opt-in system does present difficulties with attracting high levels of participation we do not believe that this necessarily justifies the introduction of a radical opt-out model. Extending the opt-in regime may be a preferable option. That said, from a policy perspective the system for collective redress should seek to compensate the victim rather than be punitive. An opt-out system, though administratively more taxing to operate, could prove effective only provided that unclaimed damages are returned to the defendant. We believe that any other method of distributing unclaimed funds under an opt-out system, if such a system were adopted, including to the Access to Justice Foundation, would introduce an excessively punitive element to collective redress, and would in fact discourage timely settlement.

1.13 **Opt-out System for Businesses:-** We do not consider that it is necessary to go so far as to adopt an opt-out model for collective actions. However if an opt-out model is adopted we would support the extension of opt-out collective actions so that they are available to SMEs and other business claimants, if necessary and appropriate, and, potentially, for combined

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

1.14 **Costs and Information Exchange:-** We do not believe that collective actions will result in either increased information exchange or in a significant jump in the number of "stand-alone" cases brought, although there is no reason why collective redress should not be permitted in such cases. It is essential, however, that the "loser pays" costs principle is retained in "stand-alone" as well as follow-on actions, even if this may require an amendment to the CAT Rules of Procedure 2003 (SI 2003/1372) ("CAT Rules") to mirror the Civil Procedure Rules 1998 (SI 1998/3132) ("CPRs") in providing explicitly that "costs follow the event". We agree with BIS that there should be no punitive or treble damages awards in collective actions (nor in any private competition law claims). Deterrence should remain the preserve of public enforcement and significantly increased damages awards could stimulate a rise in the number of spurious claims. As regards access to justice, cost capping may promote it by providing greater certainty for claimants as to exposure in limited cases where appropriate, but in our view a reciprocal cap in favour of defendants should also be considered. Contingency fees, meanwhile, may also facilitate a rise in claims by providing an extra source of funding, but could give rise to perverse incentives, especially for legal advisers, so should, on balance, continue to be outlawed for collective competition law actions.

1.15 **Bringing Collective Actions:-** Empowering competition authorities as the specified bodies for bringing collective actions, meanwhile, may lead to efficiency gains but could dent access to justice given that it would appear unlikely that the Office of Fair Trading ("OFT") or, in due course, Competition and Markets Authority ("CMA") will bring claims. As for private bodies, authorised representative organisations, such as Which? and other consumer or trade associations, should have standing. Subject to consideration on certification as to the suitability of the representative claimant, private individuals and relevant businesses should also have standing to act as representative, in order to facilitate access to justice. However, standing should not extend to law firms or litigation funders/sponsors.

1.16 **Strong Encouragement for Voluntary ADR:-** The CLLS believes that ADR should be strongly encouraged in all types of private competition law action but not be made mandatory. We would not be in favour of a pre-action protocol, because it would be impractical where claimants often need to act without warning to secure the jurisdiction of the English courts, but we would instead propose a system whereby the parties are incentivised under the rules on costs to follow a "post-issue" ADR protocol, at least by the time of preparing defences. We would not consider the role of establishing initiatives to promote ADR as a role suitable for the CLLS, but would fully support such initiatives generally.

1.17 **Cost Orders:-** The CAT Rules on formal settlement procedures should be amended, as they currently provide little incentive for either side to settle, though this should not be replaced by the CPR Part 36 regime, as it fails to address joint and several liability among large groups of defendants. Furthermore, where a claimant is awarded damages exceeding only some of the offers it has received from defendants, its costs should only be paid by those defendants who did not make an offer or whose offers were beaten.

1.18 **Redress Schemes and Role of Competition Authorities:-** Redress schemes, meanwhile, should remain voluntary, with the competition authorities having the power to certify such

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

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

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

2. Specific BIS questions

General Comments on the CAT and its role

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

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

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

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

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

Responses to specific questions

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

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

transfer from the High Court to the CAT "so much of any proceedings before the court as relates to an infringement issue".[1]

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

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

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

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

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

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

[1] Per Section 16(6) of the EA 2002, an "infringement issue" is defined as "any question relating to whether or not an infringement of the Chapter I prohibition or the Chapter II prohibition; or Article 81 or 82 of the Treaty has been or is committed".
[2] Per Rule 19.6, CPRs
[3] Rule 31, CAT Rules

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

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

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

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

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

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

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

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

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

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

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

Q3. Should the CAT be allowed to grant injunctions?

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

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

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

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

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

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

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

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

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

[4] Section 47A(1) of the CA 1998.
[5] Federation of Small Business, available at http://www.fsb.org.uk/stats
[6] Consultation Paper, paragraph 4.34

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

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

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

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

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

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

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

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

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

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

[8] Consultation Paper, paragraph 4.34

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

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

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

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

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

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

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

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

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

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

[9] The maximum for the fast-track in the High Court is much lower, at £25,000.
[10] As compared to one day in the High Court.
[11] This is essentially the same as in the High Court, where the requirement is that there be no more than two fields requiring expert evidence and one expert in each field for each party. Referring to four experts allows for the possibility that the CAT might require the use of joint experts.

- the likely complexity of the facts, law or evidence;

- the number of parties or likely parties;

- the value of any counterclaim or other Part 20 claim (or equivalent under CAT Rules) and the complexity of any matters relating to it;

- the amount of oral evidence which may be required;

- the importance of the claim to persons who are not parties to the proceedings and the importance of the claim to the parties beyond the relationship between themselves (e.g. whether the claim may have wider ramifications for the defendant). Consideration should be given as to whether the dispute can be narrowed or otherwise dealt with in such as a way as to reduce the wider significance of the case;

- the views expressed by the parties; and

- the circumstances of the parties. In particular, the CAT should more readily allocate cases to the fast track where some or all of the parties are consumers or SMEs.[12]

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

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

- There should be an expectation that cost caps will be applied in all fast track cases unless there are exceptional circumstances;

- Particular weight should be given to the circumstances of the claimant(s) and the risk of a denial of access to justice. It may be relevant to take account of the availability of insurance, the terms on which the claimant has obtained its own legal representation and whether there might be other claimants that could share the burden;

- It will be legitimate for the CAT to take account of its early impressions of the merits of the case in deciding on the level of the cap; and

- Consideration should be given as to whether the case can be narrowed or preliminary issues tried, subject to individual caps, as a way to reduce the scope of issues in dispute and/or the wider significance of the case.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[13] *The Consumers Association v. JJB Sports Plc* (Case No. 1078/7/9/07).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- First, the issue already exists in the context of certain types of competition cases that come before the CAT, namely appeals by multiple parties of decisions of sectoral regulators such as Ofcom, and also in connection with merger inquiries and appeals. It is common practice for these sorts of cases to involve extensive use of complex confidentiality/counsel-only arrangements to avoid the risk of any inappropriate information sharing.

- Practitioners are therefore familiar with the use of such arrangements (as is the CAT) and are well placed to advise their clients on ensuring such safeguards are in place. Similarly, practitioners are well aware of the implications of the sharing of price/future strategy-related information between competitors in terms of Chapter I of the CA 1998 / Article 101 of the TFEU and thus are well placed to ensure their client's conduct in collective actions is competition law-compliant.

- Finally, we note that, under its current rules of procedure, the CAT has extensive case management powers, more than sufficient to enable it to make orders to obviate the risk of any such inappropriate information exchange. All but two of the CAT Chairmen also hold warrants as High Court judges in that court's Chancery or Commercial divisions and it is our experience that CAT Chairmen can be relied upon to take case management decisions that effectively deal with the often complex issues arising in competition litigation. We see no reason why, in cases where information sharing safeguards are plainly necessary, that these could not be imposed by the CAT.

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

[15] We would also expect guidance to be published by the CAT, possibly by way of an addition to its Guide to Proceedings.

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

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

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

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

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

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

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

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

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

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

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

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

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

- First, by allowing claimants to opt-in up until a late stage in proceedings[18], this means that the representative claimant is not required to identify a sufficiently large group of claimants before commencing proceedings. A representative claimant will be able to use the heightened publicity arising from the commencing of proceedings to attract further claimants to the action once it has been commenced. Given the complexities that arise even in follow-on actions, this would give representatives a window of at least six months (assuming the cut-off is some time prior to trial) to publicise the case and increase the class of claimants.

- This in turn will make the prospects of settlement materially more attractive to a defendant (assuming the claim has a reasonable prospect of success) as the additional time given for affected parties to opt-in and the heightened publicity ought to diminish the chances of further, separate, claims being brought against the defendant(s);

- Moreover, as compared with an opt-out model, it would also allow a court to accurately set the quantum of damages it orders the defendant(s) to pay, rather than having to estimate the total quantum of damages that the defendant(s) is/are liable for. While in some cases, where the period of infringing conduct is quite recent and there is a relatively limited number of parties who have suffered loss and/or detailed sales records, this will be relatively straightforward; in cases which involve sales made a long time ago, estimating the total quantum of damages will be difficult.

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

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

[17] Consultation Paper, paragraph 5.32.

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

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

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

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

Design Details of an Opt-Out collective Action Regime

Certification

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

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

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

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

- As part of considering whether the representative claimant has sufficient funds to cover the costs of the defendant should its case be unsuccessful, we consider that the CAT should form a view as to whether an order for security for costs is likely to be required. Such an order may well dampen a representative claimant's appetite for bringing a claim and it is preferable that representative claimants have the opportunity to reconsider commencing proceedings once the CAT has issued a (non-binding) view on the issue at certification stage.

- Whether the collective action has a reasonable or arguable case on jurisdiction. If it is clear to the CAT that there is no jurisdiction for the representative claimant to bring the claim then they should decline permission to bring proceedings.

- Similarly, the CAT should ascertain that the representative claimant has reasonable grounds to consider that the claim is within the relevant limitation period (within two years of the relevant date).[19] We recognise that limitation is usually used as a shield, with the onus on the defendant to plead and argue limitation as a defence; however, in the circumstances it seems appropriate for the CAT to be able to ensure that the claimant has a clear, at least arguable, basis for considering their claim to be brought within the relevant limitation period.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[20] [2007] EWHC 2394.

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

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

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

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

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

In addition to the above, funders should also be liable for the defendant's costs in such cases if the claim is unsuccessful, in accordance with the decision in *Arkin v Borchard*.[24]

Q18. Are there are circumstances in which it should be departed from, either (a) in the interests of access to justice or (b) where the costs of the claimant could be more appropriately met from the damages fund?

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

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

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

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

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

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

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

[24] [2005] EWCA Civ 655.

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

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

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

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

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

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

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

- The interest of lawyers in the level of damages awarded can create perverse incentives/conflicts of interest between the law firms driving the litigation and those who have suffered loss. This is also likely to make settlements more difficult.

- DBAs would also lead to incentives to inflate the size of the class in an opt-out case/the size of the potential damages.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Q21. If unclaimed sums were to be paid to a single specified body, in your view would the access to justice foundation be the most appropriate recipient, or would another body be more suitable?

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

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

A: Competition authority

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

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

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

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

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

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

Private bodies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

In this regard we note that:

- Rule 1.4(e) of the CPRs makes it part of the Court's duty for furthering the "overriding objective" to "encourag[e] the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure";

- Paragraph 8 of the CPR Practice Direction on Pre-Action Conduct encourages parties to consider the use of ADR pre-action and throughout the action. In accordance with paragraph 4.6 of the same Practice Direction, non-compliance may be punished through costs orders, awards of penal interest or deprivation of interest and/or the imposition of a stay. Where formal pre-action protocols exist for particular types of action, it is routinely a requirement of them that the use of alternative dispute resolution be considered;

- Question 1 of the standard Allocation Questionnaire (Form N150) requires all parties to consider whether they would like a stay to try and negotiate a settlement. The Court can order a stay for this purpose even if only one party asks for it;

- Provisions in the Commercial Court Guide require parties to provide information about what steps they have taken to resolve the dispute by ADR or, alternatively,

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

- A series of judicial decisions have confirmed that it can be appropriate to impose costs sanctions for an unreasonable failure to participate in alternative dispute resolution processes. See, for example, *Dunnett v Railtrack plc* [2002] EWCA Civ 303; [2002] 1 W.L.R. 2434 and subsequent cases applying it;

- As noted in the Consultation Paper (at paragraph 6.9), the CAT can also encourage the use of ADR. Rule 44(3) of the CAT Rules gives the CAT the power to "encourage and facilitate the use of an alternative dispute resolution procedure if the Tribunal considers that appropriate". The CAT has used those powers in a number of cases.

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

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

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

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

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

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

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

- Parties should be free to insist on their right of access to the courts. It is a fundamental right of parties, protected inter alia by Article 6 of the European Convention of Human Rights, to have a "fair hearing" before "an independent and impartial tribunal". As most commercial litigators will concede, mediation (probably the most popular form of ADR) does very often resolve disputes but it does so in a fashion that typically has little to do with the merits of the case or, more broadly, in a way that would respect Article 6 rights.

- It has so far generally been the policy of the Government and the courts not to make ADR mandatory. In fact, we note that paragraph 3.9 of the Pre-Action Protocol for Defamation Claims goes as far as to say that, "It is expressly recognised that no party can or should be forced to mediate or enter into any form of ADR." Similar statements are made in other pre-action protocols. We see little justification for singling out private competition law actions as an exception in that regard.

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

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

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

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

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

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

[26] CPRs, Practice Direction: Pre-Action Conduct

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

a) Fast-track

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

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

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

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

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

b) Collective actions

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

c) All cases in the CAT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Voluntary redress schemes

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

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

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

- It would be a resource-intensive exercise for the relevant competition authority requiring it to engage with the specifics of the particular case and diverting its resources away from other, higher priority activities including enforcement;

- It is not necessarily a task that falls within the expertise of the competition authority. Competition authorities do not currently get involved in the quantification of losses at all whereas there are many other professionals who do it every day. Whilst the competition authority's assessment could be expected to be impartial, the approach required could well run the risk of leading to erroneously high or low figures;

- If the competition authority is to get involved in the substance of redress proposals, there may be issues about what information it can use in assessing those proposals. The competition authority may well have access to information that could not or would not otherwise be available to claimants, defendants and/or tribunals determining such issues (e.g. leniency submissions or information relating to connected investigations);

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

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

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

- Submission of claims to an independently appointed panel of experts, perhaps consisting of one lawyer, one economist and one accountant;

- Agreement by any participating cartelist to accept the panel's decisions as binding. Decisions would only become binding on purchasers if they chose to accept them;

- Power of the panel to determine its own procedure in any particular case, including the evidence to be received (albeit with an expectation that evidence will be kept to a reasonable minimum);

- Power of consumer / representative organisations to be involved and make submissions;

- Flexibility on defendants to offer non-monetary redress;

- Supervision / administration of the process by a renowned ADR provider such as CEDR;

- Processing of claims by an independent claims handler;

- Funding of the process by the cartelist(s).

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

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

Imposition of redress schemes

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

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

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

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

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

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

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

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

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

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

- Companies with infringement appeals pending may legitimately be reluctant to discuss compensation whilst there remains a chance that they will not be held liable at all. The availability of a *Masterfoods* stay in formal damages litigation allows them to avoid doing so;

- A company submitting to a voluntary redress scheme might be able to avoid the opt-out collective action through a challenge to the jurisdiction of the court, a challenge to class certification or otherwise. More broadly, the company would be sacrificing the ability to raise all manner of procedural objections to claims;

- A company submitting to a voluntary redress scheme will be accepting a probably less rigorous testing of purchasers' claims;

- If the model adopted were similar to that proposed by the CBI, which would be binding on the cartelist but only binding on purchasers who accept the result of the process, a company submitting to the scheme would not be getting any certainty and might be wasting a lot of costs for little gain;

- The formal litigation process will tend to delay the payment of compensation. Even with mounting legal costs and interest, the delay may still be valuable to companies.

- The alleged cartelist would also be exposing itself to the costs of participation in the redress scheme (including the funding of the process if a solution like the CBI's were adopted).

- There is likely to be a considerable benefit for claimants above and beyond anything they may achieve in litigation. In particular, compensation is likely to be available much more quickly and easily.

- There is a benefit in terms of deterrence. The Consultation Paper and BIS Impact Assessment recognise that greater and quicker compensation will add to deterrence. If the redress scheme speeds up the process of compensation and avoids procedural obstacles to it, there is likely to be a public deterrence benefit. Such a benefit or, conversely, the reduced need for the penalty to provide deterrence is something that ought properly to be recognised in setting fines.

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

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

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

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

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

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

Thirdly, facilitating redress for those who have suffered loss as a result of competition law would complement the public enforcement of competition law to the benefit of victims of infringements. By achieving this outcome through the strengthening of the private enforcement regime, rather than by involving the OFT in ordering redress in addition to imposing fines, the OFT could continue to focus on its primary responsibility of public enforcement of the competition law rules.

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

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

A: We agree that potential leniency applicants may be deterred from applying for leniency if they believe that doing so could make them more vulnerable to private actions than their co-cartelists.

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

Given the significant role of the leniency regime in increasing the likelihood of detection – and ultimately prevention – of cartel conduct we therefore support the proposal that certain

leniency documents should be protected from disclosure in the context of private actions brought in the English courts.

With regard to the precise details of which documents should be disclosed and which documents should be protected, we agree that it is important to strike the right balance between claimants' rights to compensation on the one hand and ensuring the continued success and effectiveness of the OFT's leniency programme on the other. We would propose that only those documents which would not have existed but for the leniency process should be protected from disclosure in the context of a private action brought before the CAT (or the High Court, if the proposals to extend the role of the CAT are not implemented). So, for example, a corporate leniency statement should be protected, but pre-existing documents disclosed to the OFT/CMA as part of an application for leniency should not be.

We note in this regard that the European Commission's work programme for 2012 includes adopting a directive that would harmonise certain aspects of private damages claims across the EU and coordinate private and public antitrust enforcement. We understand that this is intended to include regulating access by private claimants to documents provided by a whistle-blower pursuant to a leniency programme, in the wake of the European Court of Justice's decision in *Pfleiderer AG v Bundeskartellamt* (Case C-360/09). The possibility of legislative proposals being brought forward by the European Commission on this issue is acknowledged in the Consultation Paper,[28] but it is suggested that there may be increased urgency for action at the UK level if private actions are extended as proposed. We would note that, based on the "roadmap" published by the European Commission[29] a proposed directive was due to be published in June 2012. Although no proposals have been published to date (as far as we are aware), we understand that a consultation document is expected in September or October.

It is not entirely clear whether the planned EU directive will cover only documents provided to the European Commission under the EU leniency regime, or also documents provided to national competition authorities such as the OFT under national leniency regimes. However, given the stated intention to harmonize certain aspects of private damages claims across the EU the second of these two options seems likely. We would assume that BIS will in any event have regard to the proposed EU approach when reaching a final decision the extent to which certain leniency documents should be protected from disclosure under the UK regime.[30]

On this issue, although the precise details of the European Commission's proposed approach are not yet clear, it seems clear from its submission to the English High Court in *National Grid v ABB & others* [2012] EWHC 869 Ch that it will seek to ensure that leniency documents are protected as far as possible and only disclosed as a last resort. This is also the approach adopted in the recent resolution adopted by the European Competition Network ("ECN") on this issue (with which the OFT was presumably involved as a member of the ECN).[31] As set out above, we would suggest that the UK Government should take a

[28] See paragraph 7.5 of the Consultation Paper.

[29] http://ec.europa.eu/governance/impact/planned_ia/docs/2009_comp_023_damages_breaches_antitrust_en.pdf

[30] Whilst it is anticipated that any EU directive in this field will only set minimum standards, and Member States will remain free to adopt higher standards should they wish to do so, it will nonetheless clearly be important to have regard to the ongoing developments at EU level.

[31] Resolution of the Meetings of Heads of European Competition Authorities of 23 May 2012, "Protection of leniency material in the context of civil damages actions" – see http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf

similar approach on this issue, subject to the caveat that not all documents associated in any way with a leniency application should be protected from disclosure, but rather only those which would not have existed but for the leniency application.

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

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

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

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

A: We do not consider that there are any other measures other than those discussed above which are necessary to protect the public enforcement regime in light of the proposed strengthening of the private enforcement regime.

City of London Law Society Competition Law Committee

23 July 2012