BUSINESS INNOVATION & SKILLS SELECT COMMITTEE

PRE LEGISLATIVE SCRUTINY OF DRAFT CONSUMER RIGHTS BILL

Written evidence by the City of London Law Society's Competition Law Committee

Comments on Schedule 7 (private actions in competition law)

Summary

1. The City of London Law Society Competition Law Committee broadly supports the proposed legislative reforms set out in Schedule 7 of the Consumer Rights Bill. However the Committee does have a number of concerns about the provisions in the Bill.

2. The Committee is broadly supportive of:

    - **CAT Jurisdiction**:- extending the role of the Competition Appeals Tribunal (CAT) to hear standalone as well as follow-on cases and the setting of a standardised limitation period for competition cases before the CAT as well as in the High Court;

    - **Transfer of Cases**:- enabling the Courts to transfer (standalone and follow-on) competition law cases to the CAT and vice versa;

    - **Injunctions and Fast Track Procedure**:- the CAT granting injunctions and the introduction of a fast track procedure for simpler competition claims in the CAT;

    - **Opt-out Collective Actions**:- the Committee was agnostic in its response on this issue to the earlier Government consultation, but believes that an opt-out system could work if appropriate legal and procedural safeguards are put in place;

    - although originally agnostic in its response on this issue to the earlier Government consultation, the Committee believes that an opt-out system could work well if appropriate legal and procedural safeguards are put in place;

    - **Voluntary Redress Schemes**:- the Committee believes the encouragement of voluntary redress schemes are an essential part of promoting ADR remedies in the competition field. However, there needs to be transparency about how voluntary redress schemes, collective actions and collective settlements each relate with the other.

3. The Committee does have concerns that the relevant provisions of Schedule 7 as currently drafted contain provisions or omissions which could adversely affect the effective operation of the legislation in practice. We have set out below our concerns in more detail and suggested how these shortcomings could be remedied.

The City of London Law Society Competition Law Committee

4. The City of London Law Society represents approximately 17,000 city lawyers with individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from international companies and financial institutions to Government Departments, often in relation to complex, multi-jurisdictional legal issues.

5. The Society's Competition Law 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 Government bodies on competition law matters.

6. The authors of this response are:

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7. The Committee took an active part in the Government's consultation on "Private Actions in Competition Law" reform proposals that underlie Schedule 7 of the Bill, liaising both formally and informally with the Department for Business Innovation & Skills and with the competition authorities, including by way of a formal written consultation response that was submitted to the Department in July 2012.

Jurisdiction of the Tribunal: New Section 47A of Competition Act 1998

8. The combined effect of new Section 47A(1) and (2) of the Competition Act 1998 (the "1998 Act") - as substituted by Paragraph 4 of Schedule 7, Part 1 of the draft Bill appears to strictly limit the Tribunal to hearing claims alleging breach of the Chapter 1 or Chapter 2 prohibitions in the 1998 Act and/or claims alleging breach of Articles 101(1) or 102 of the EU Treaty and not any other claims, even if closely associated with the claims for breach of the various competition provisions. We consider that a strict limit may give rise to issues. There are situations (at least in stand-alone cases) where victims of anti-competitive behaviour for various legitimate reasons are likely to wish to plead additional or alternative claims including, without limitation, alleging breach of contract, misrepresentation, deceit or common law conspiracy. The Tribunal should be given the ability to also hear other claims in appropriate cases where the claims made predominately relate to an infringement or alleged infringement of competition provisions of the 1998 Act or the Treaty on the Functioning of the European Union. The draft Bill and/or the amended Tribunal Rules should give the Tribunal discretion to either hear the non-competition claims where it would be appropriate and efficient to do so or transfer them to the High Court if it considers they can more efficiently be dealt with in separate proceedings. Bearing in mind that all Chancery Division judges are also Chairs of the Tribunal, there is clearly the necessary expertise in the Tribunal to hear any sort of claim. If the draft Bill remains as it is it may continue to discourage victims from suing in the Tribunal - in the same way as did the original limitation to follow-on claims - since victims will fear that they will otherwise risk satellite litigation over the nature of claims

and/or inefficient and costly duplication of proceedings and/or a risk of irreconcilable judgments.

New Section 47A(3) appears to prevent the Tribunal giving declaratory relief and might be interpreted as preventing the Tribunal requiring payment of pre-judgment interest. We can see no good reason for excluding these remedies.

Composition of Tribunal in Fast Track Cases: New Section 14(1A) of Enterprise Act 2002

9. New Section 14(1A) of the Enterprise Act 2002, introduced by Paragraph 19(3) of Part 2, Schedule 7 requires that fast-track cases are dealt with by a single Tribunal member. Whilst we accept this may be appropriate in most cases, we can foresee others where the Tribunal would benefit from the involvement of wing-members with expertise in economics or other fields. We suggest that it would be better to replace the word "shall" with the word "may" so that the Tribunal can decide what is most appropriate in any given case.

Limitation Periods: New Section 47E of Competition Act 1998

10. New Section 47E(2) wrongly assumes that the limitation period for claims under Section 47A or 47B will always be governed by English law. There are likely to be many cases where limitation is governed by a foreign law. It should be clarified that Section 47E(2) does not affect the position where limitation is governed by a foreign law, for example by reference to the Foreign Limitation Periods Act 1984. This would align the position with that in the High Court.

New Section 47E(7) suggests that the Tribunal will have power to extend statutory limitation periods. Any such power should be tightly circumscribed, limited to circumstances analogous to those in which the High Court is permitted to extend limitation periods.

Paragraph 8(2) of Schedule 7, Part 1 of the draft Bill provides that Section 47E of the 1998 Act is not to apply to claims arising before commencement of Paragraph 8, whereas Paragraphs 4(2) and 5(2) provide that new Section 47A and 47B apply to claims arising before the commencement of these paragraphs. As currently drafted, this creates two unfortunate anomalies.

First, the limitation period is compromised for claims that arise before commencement of Paragraph 8 but which can be brought before the Tribunal under new Sections 47A or 47B by virtue of Paragraphs 4(2) and 5(2) of Schedule 7, Part 1 of the draft Bill. As currently drafted, Section 47A(1) states that the claims will be "subject to the provisions of this Act and Tribunal rules." The limitation period set out in the Tribunal rules should apply given that the new Section 47E will not apply to such claims. The Tribunal rules currently state that a claim in proceedings under Sections 47A and 47B of the 1998 Act "must be made within a period of two years beginning with the relevant date." The relevant date for these purposes is the later of "(a) the end of the period specified in Section 47A(7) or (8) of the 1998 Act in relation to the decision on the basis of which the claim is made; and (b) the date on which the cause of action accrued." Given that Section 47A(7) and (8) of the 1998 Act will be deleted, the limitation period should expire two years from when the date on which the cause of action accrued, which may fall during a period in which the relevant infringement decision is still under appeal. Transitional provisions therefore need to be introduced to ensure that there is an appropriate limitation period applicable to such claims, and to ensure that any claims which would be time-barred under the

current regime could not be 'revived' by virtue of the extension of the Tribunal's jurisdiction.

Second, the machinery in new Section 47E(3) to (6) would not appear to apply to any claims arising before commencement of Paragraph 8 if those claims are included in a collective action under new Section 47B. This could have the unfortunate, and possibly unlawful, effect of depriving victims of claims (or preventing opt-out) if limitation periods expire before a decision on certification.

Collective Proceedings: New Section 47B of Competition Act 1998

11. In relation to new Section 47B(6), we note that this requires the Tribunal to assess whether claims are suitable to be brought in collective proceedings. The Government Response of 29 January 2013 (the “January Response”) stated that the certification process should include a requirement that a "collective action must be the best way of bringing the case". We consider that Section 47B(6) should be amended to reflect this policy intention, for example by providing that collective proceedings must be the "most suitable" or "most appropriate" method of bringing the claims for the claims to be eligible for inclusion.

In relation to new Section 47B(7)(c) we believe that revised Tribunal Rules should set out the factors which it must take into account when deciding whether the proceedings should be brought on an opt-out or an opt-in basis.

We note that new Section 47B(8)(a) does not provide for the Tribunal to assess whether the class member is suitable to be appointed as a representative bringing collective proceedings namely whether it is just and reasonable for this person to act as representative in those proceedings. We consider that the Tribunal should do so, as for non-class member representatives.

In relation to non-class member representatives, we note that the January Response stated that, due to a risk of abuse, law firms, third party funders and special purpose vehicles would not be able to act as representatives for the purposes of bringing collective proceedings. We consider that this exclusion should be included within new Section 47B(8)(b) or provided for within amended Tribunal Rules.

We additionally note that it would be advisable for the amended Tribunal Rules to include provisions clarifying what ought to happen where multiple claimants file claims seeking to commence an opt-out collective action. If priority is effectively given to the first claimant to file, this will tend to result in a "rush to the courthouse" where ill-considered claims are filed at a very early stage. It is also unlikely that the most appropriate representative will be chosen.

Unclaimed Damages in Collective Proceedings: New Section 47C of Competition Act 1998

12. New Section 47C(5) provides that where the Tribunal makes an award of damages in opt-out collective proceedings any damages not claimed by represented persons within a specified period must be paid to the charity for the time being prescribed by the Lord Chancellor under Section 194(8) of the Legal Services Act 2007. We think there are a number of ambiguities raised by the current wording as well as a larger issue of principle.

We also are concerned at the somewhat arbitrary nature of the provision and that it risks a lack of proportionality. We believe that the Tribunal should be given discretion

in each case on whether to pay the whole or any part of the unclaimed damages to the designated charity or to consider whether in the individual facts of the case it might be more just and equitable to return some or all of the damages to the defendant. It may be just and equitable to return some or all of the damages in order to avoid double recovery or a punitive element where, for example: some of the represented persons have chosen to sue / claim damages overseas instead; some of the represented persons have taken advantage of a parallel CMA backed compensation scheme; where some of the represented persons have recovered their losses from other conspirators and/or under other causes of action; and/or where new information shows that the initial estimate of the number or value of UK-based victims was incorrect. It is impossible to legislate to cover every eventuality and in the circumstances we feel it is best to provide that the Tribunal should retain limited discretion as to the destination for any unclaimed damages upon any application by the parties to the Tribunal.

Collective Settlements: New Sections 49A and 49B of Competition Act 1998

13. New Section 49B(5)(b) limits a collective settlement where a collective action has not previously been certified to a settlement of claims that could have been brought under Section 47B. If new Sections 47A and 47B remain as currently proposed, this would mean that the only claims that could be settled would be claims alleging breach of the 1998 Act and/or Articles 101(1) and/or 102 of the Treaty on the Functioning of the European Union (see comments above in relation to the combined effect of Section 47A(1) and (2)). This would appear to prevent defendants obtaining a full release from all possible claims and may therefore make the Section 49B procedure redundant.

    The January Response noted that, although any unclaimed sums would normally be paid to the Access to Justice Foundation, defendants should be "free to settle on other bases, including on a cy-près or reversion-to-the-defendant basis, subject to approval by the CAT judge." The Tribunal Rules should therefore be revised to note that the Tribunal may find a collective settlement just and reasonable under new Section 49A(5) or 49B(8) notwithstanding that the terms of the settlement may provide for unclaimed sums to be returned to the defendant or any other method of disposal other than that set out within Section 47B(6).

Promotion of Voluntary Redress Schemes: New Section 49C of Competition Act 1998

14. We consider that in order to incentivise undertakings to put forward voluntary redress schemes for approval by the CMA, there should be a provision in proposed new Section 49C or within the regulations to be made thereunder that the terms of a redress scheme may provide that a person waives its rights to bring a claim (either in the Tribunal or elsewhere) or seek payment under a collective settlement order if it has been compensated under a CMA-approved redress scheme for alleged loss suffered as a result of the infringement of competition law to which the redress scheme relates. Alternatively Section 49C CA98 and/or the regulations made thereunder could provide that the CMA may not take into account whether the terms of a redress scheme include such a provision when deciding whether to approve a redress scheme.

City of London Law Society Competition Law Committee

15th August 2013