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**Response to Consultation on
Private Actions in Competition Law: A Consultation on Options for Reform
(Department for Business Innovation and Skills, 2012).¹**

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A. GENERAL ISSUES

I have no general problem with the proposal to move competition cases to the CAT and enhance its rules, so do not comment on that aspect.

It is axiomatic that redress must be paid following infringement of a right that leads to damage. However, I have a series of fundamental problems with the proposed approach in relation to delivering redress by private collective means. I do not think that the proposed technique will work, and I believe that it is a very poor policy that will do considerable harm and little good. The reasons for my view are numerous, summarized below. Overall, I believe that the proposals on private redress would be extremely bad policy, and a major wasted opportunity to adopt other options that would be far better policy.

1. The proposals fail to support economic recovery

The government's proposals would not succeed in delivering the primary objective of contributing to economic recovery. Instead, they would largely do the opposite, promoting an increase in expensive litigation. There are three main reasons:

- a. The theoretical benefits of these proposals are minimal, as predicted by BIS.**
- b. The costs would far exceed the benefits: the proposals would introduce what is already being perceived by international businesses as a highly unattractive element of litigation risk into the UK's commercial environment and legal system, which would hinder investment in the UK.**
- c. In any event, they would fail to work in practice.**

¹ <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf>

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The level of economic impact for the proposals that is estimated by BIS' modelling is low and unimpressive. The modelling estimates maybe one or fewer extra stand alone cases a year, one or two extra follow on cases, with only modest levels of damages. The low level of damages raises questions about the financial viability of such cases, comparing damages and costs (see below). In any event, the assumed benefits are hugely outweighed by the potential adverse cost of litigation to the economy and to the negative effect on the economy generally, flowing from the attitude of international businesses towards inward investment into the U.K.

Further, the various approaches adopted in the Impact Assessment raise a series of concerns.² The document starts by considering the possible impact of transferring High Court (HC) competition cases to the CAT (option b, para 74 on). This records that the current number of cases heard by the HC and CAT combined is 10.25 cases per year (table 4 on page 19).

The Impact Assessment then adopts the assumption that after the reforms the number of cases will increase by 25%. This expected increase in the number of cases is expected to mean that post-reforms the number of cases will be 12.8125 annually (that is, 10.25 cases x 1.25). Extraordinarily, the basis of this assumption is solely the view of "one leading legal expert" (see para 77).

For some reason that is unexplained, the Impact Assessment then rounds up this number from 12.8125 to 13 cases post reforms (footnote 30 on page 18). (Rounding up has no rational basis and distorts outcomes. If the Impact Assessment did not 'round' the numbers, the total increase in cases post reform would be 2.56 cases annually; of which 1.81 would be stand-alone cases and 0.75 would be follow on cases.)

It also assumes, without citing substantiation, that the number of stand alone and follow on cases will both increase equally (by 25%) after the reforms.

These assumptions lead to the estimation that the reforms would lead to (only) *1 extra follow on case, and 1.75 extra stand alone cases* a year (table 7, page 20). This distribution is arrived at on the basis that:

- the expected number of stand-alone cases after reforms is 9.06 (=7.25x1.25) which is then rounded down to 9 cases by BIS. This implies an increase of 1.75 cases (i.e.: 9 - 7.25) (table 7, page 20);
- the expected number of follow on cases after the reforms is 3.75 (=3x1.25) which is rounded up to 4 cases by BIS. This implies an increase of 1 case per year (i.e: 4 - 3).

There are, therefore, several methodological issues with BIS' approach. First, the source of the overall growth assumption (the 25% expected increase in cases) is unsubstantiated and highly speculative. Secondly, the assumed 25% growth rate has simply been applied equally across the two types of cases. Thirdly, there is the rounding up.

Later in the document (commencing at para 196) there is an estimation of the impact of introducing opt-out collective actions (option e). That is based on figures of cases from Canada, Australia and Portugal. The analysis concludes that there would be between zero and 0.6 extra stand alone cartel cases in U.K. a year (table 13), and that the best estimate (the Canadian position, for which the data is thin, but not as miniscule as the figures for Australia

² I am indebted to Dr Chris Decker for the following analysis.

and Portugal) would be 0.4 successful cases a year, with total annual damages paid estimated to be £16.9m. In other words, there would be *one extra stand alone case every 2.5 years, with damages totalling £4.2m.*

That analysis is based on the assumption that the number of stand alone cases in U.K. would be 25%, since 25% of Canadian cases are stand alone (para 193). Yet the values of costs and damages vary between the two jurisdictions, so the assumption is entirely speculative.

Overall, these figures fail to satisfy the government's policy of only legislating where there is clear evidence of need.³

The various problems with the Impact Assessment give rise to the potential prospect of judicial review if the government do not make efforts to explore some of these critical assumptions at the necessary level of detail. The basic point is there is a minimum standard of proof that has to be satisfied with Impact Assessments.⁴ Basing the analysis on "one person's view" appears to raise a strong presumption that that standard has not been satisfied. Similarly, simply adopting values from Canada without properly accounting for the substantive differences in the two regimes is poor administrative practice and arguably also open to challenge on this basis.

Further, the proposals fail to explain why:

- There would be any significant increase in whistle-blowing.
- There would be any significant increase in 'stand-alone' enforcement actions.
- The actions that would be likely to be brought would not be limited to 'follow-on' actions after determinations of infringement by a public authority. Hence, why there would be any increase in discovery of infringements and associated deterrence.

I suggest that none of these effects would occur.

2. A private action regime is far too slow, costly and uncertain in delivering compensation for dispersed losses. It does not serve claimants' interests.

Theoretical comparisons of public and private enforcement invariably only compare calculations on the supposed costs of those two methods of enforcement—but *omit* the key

³ 'Recurrent weaknesses in departments' assessments of costs and benefits when designing regulation': *Delivering regulatory reform* Report by the Comptroller and Auditor General (National Audit Office, 2011), available at <http://www.official-documents.gov.uk/document/hc1011/hc07/0758/0758.asp>

⁴ The judicial review (JR) tests established by Lord Diplock in *Tameside* for administrative decision makers are: (1) did they ask the right questions; and (2) did they take reasonable steps to acquaint themselves with the relevant information in order to answer the question correctly: *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at para 1065B. The CAT has also endorsed this general JR principle when conducting judicial reviews. In its PPI decision, the CAT specifically stated that administrative bodies have a duty to ask the right questions and make adequate enquiries, citing the requirement established by Lord Diplock in *Tameside* that: "the question for the Court is, did the [decision maker] ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly". *Barclays Bank v Competition Commission* [2009] CAT 27 at para 24.

criteria of *duration* and the practical realities of *costs* to claimants and their funders in this jurisdiction.⁵

All court processes take time and cost money. Collective procedures, even follow-on cases, take a long time and cost a lot of money. Consumers and SMEs are kept out of their money for a long time – often at least 5 years after an infringement decision by a public authority.

The introduction of collective private actions would *not* result in the benefit that is claimed in some theoretical writing of ‘judicial economy’ and hence efficiency, but would merely delay payment of compensation unnecessarily for several years. There is clear evidence that collective actions give businesses the opportunity to fight a war of attrition for a long time. Large companies can afford to spend large sums in defending collective cases for years, meanwhile reserving against the ultimate cost. Discussions with companies indicate that that is exactly how they would behave if faced solely by a litigation threat, after any fines have been dealt with.

Defendants have a predictable incentive in defending claims for some time: to seek to reach a lower settlement than ‘full compensation’. In economic theory, ‘full compensation’ is discounted by part of the costs the claimants would have to spend and by the risks of litigation, but in reality the sum agreed is reached by negotiation rather than empirical assessment of discounted loss.

Hence, litigation settlements bear little relationship to the level of illicit gain or loss, nor to the seriousness of any unlawful behaviour, or recidivism, but simply to the expediencies of commercial negotiation. Hence, private ‘sanctions’ bear little relationship to public sanctions in terms of proportionality or justice.

The overall economic result would be that expensive transactional costs of litigation would be incurred by both claimants’ funders and businesses, and reduce damages paid to victims: neither of those aspects assists economic health. Litigation funders currently take 30 to 40% of victims’ recoveries, usually *net*, after legal and financing costs.

3. Funders only fund B2B follow-on cases and not stand-alone cases in Europe; and do not fund B2C or SME cases. That situation would only change if reforms in funding and costs rules were introduced that are currently regarded as absolutely unacceptable.

The government has put forward no evidence that more stand-alone cases would come to light absent the public leniency programme (in other words, the authorities would inevitably be involved, so the starting point is that cases would not be stand alone but follow on), nor that stand alone cases would be funded, given the risks and costs.

⁵ The proposals cite RP McAfee, HM Mialon and SH Mialon, ‘Private v Public Antitrust Enforcement: A Strategic Analysis’, *Journal of Public Economics* 92 (2008) 1863–1875. That paper completely omits consideration of duration and the calculations that it models are based on a cost system that excludes the loser pays rule. Further, the starting assumptions of the paper are unsupported and highly questionable: it asserts that ‘private enforcers have a greater incentive to take antitrust action than public enforcers’ and private enforcers’ ‘costs of detecting possible violations and gathering initial evidence are lower [than public enforcers]’.

The government states that it hopes to ‘create a framework whereby individuals and businesses can represent their own interests’ (Impact Assessment, para 30). That is simply unrealistic in most cases. The Impact Assessment accepts that the minimum threshold of viability for bringing a case is damages of £500,000, and more like £3m (paras 67 and 85), given that costs per case are between £6m and £9m for stand alone cases and between £3m and £5.4m for follow on cases (table 5, p 19). It cites a survey finding that half of those who thought they had been a victim of anti-competitive behaviour did not consider bringing a legal claim because the expected costs outweighed the benefits (para 156⁶). The government’s assumption that a private right of action would solve the problem is misguided. Private litigation is no answer for cases where individual and/or total damage is less than the viability threshold.⁷

In order for any collective action to be sufficiently attractive to those who contemplate funding it, there need to be sufficient financial incentives for it to be worth the investment in costs. That is well established by academic research:⁸ the clearest example is the U.S. class action system, which has no barriers to litigation and major incentives (no loser pays rule, widespread one-way cost shifting rules, no investment by claimants, huge incentives for intermediaries through fees and high damages (triple damages in antitrust).⁹

If those incentives are not in place, European and other experience shows that claimants and funders (lawyers or other investors) will only be attracted to cases that have very high chances of success, and very high profit ratios. That explains why they clearly select follow-on actions rather than stand-alone actions, and large B2B cases, never small dispersed loss cases (consumers or SMEs).

If any funder is to invest in a case, the risk-benefit ratio needs to be attractive. Follow-on cases are inherently considerably more attractive investments than stand-alone cases, since they involve far lower risk. The returns also need to be attractive. This means that a funder should be able to earn a large premium and ideally be insulated from an adverse costs risk. The legal system in U.S.A. provides both those features, and others, but unregulated contingency fees and no ‘loser pays’ rule are regarded in this jurisdiction, and generally across Europe, as introducing unacceptable risks. Hence, the incentives for lawyers to invest in large collective cases are generally unattractive. Instead, ‘third party’ litigation funders have emerged to fund competition damages cases.

Litigation funders pick and choose the cases they invest in, on the basis of maximising their profit, and achieving returns within a reasonable time. Thus, all cases to date have been follow-on cases, since the risk is low: a finding of infringement has already been made, and liability is ultimately not in issue. Why should it be assumed that *any* external funder, let alone consumers or SMEs (individually or collectively) would accept the risk of a stand-alone case, involving potentially significant expenditure on investigation with an inherently uncertain outcome?

⁶ Citing *The deterrent effect of competition enforcement by the OFT* (OFT, 2007).

⁷ See the *Cardiff Bus* case noted below. No individual litigant or independent funder would rationally invest in a case costing several millions for damages of £34,000 or even £94,000. A different approach from private litigation is needed for such cases: the OFT could have solved the problem itself but has opted out.

⁸ See citations at C Hodges, ‘Objectives, Mechanisms and Policy Choices in Collective Enforcement and Redress’ in J Steele and W van Boom (eds), *Mass Justice* (Edward Elgar, 2011).

⁹ For a recent review of the attitudes of Litigation Funders see: C Hodges, J Peysner and A Nurse, *Litigation Funding. Status and Issues* (Centre for Socio-Legal Studies, Oxford and Lincoln University, 2012), at <http://www.csls.ox.ac.uk/documents/ReportLitigationFunding.pdf>

Given the above parameters on funding and costs, the following realities apply:

1. Consumers and SMEs cannot afford to finance *individual* litigation. An assumption that they would be able collectively to finance both the cost and the risk¹⁰ of *collective* litigation is not supported by empirical evidence from litigation behaviour.
2. Hence, funding for collective cases would have to come either from third party litigation funders or from lawyers acting *pro bono*. The litigation funding market for funding follow-on cartel cases has grown quickly in Europe, but operates on selective criteria, as discussed below.¹¹ Some lawyers currently operate on a *pro bono* basis, but supply is limited and will shrink as litigation funding grows, as lawyers transfer the risk to third parties.
3. The empirical evidence is that neither lawyers nor independent litigation funders find it attractive to finance consumer or SME cases, since they are too costly and cumbersome. Cases that involve small individual losses, especially with a large pool of dispersed claimants, are just not attractive to funders. The administration costs and complexity are too great. There is no likelihood that this situation will change.
4. Thus, funders in Europe have clearly opted to fund B2B collective cases instead of consumer and SME cases. The simple reasons are that B2B cases involve large individual damages, are sufficiently cost-effective, and offer far more attractive returns than could be obtained from C2B or SME cases.¹²
5. Any other funder that might emerge, such as the Access to Justice Foundation, would be at risk of being wiped out by adverse costs if only a small percentage of cases that it funded were lost. It is that reality that has prevented a Conditional Legal Aid Fund (CLAF or related SLAS) from being created, despite much talk over decades.

Whilst ADR can shorten the duration of the process and save costs, ADR cannot be made compulsory and the incentives for defendants to enter ADR are currently not strong enough.

As discussed below, in contrast, the incentive to negotiate a deal when faced with a public authority that has power to impose sanctions as well as to require compensation to be paid is far greater and more effective. The incentive is particularly strong if the company is able to seek a lower sanction in return for paying compensation.

6. There is wide consensus that safeguards are needed to guard against abuse in collective litigation

¹⁰ The risk of adverse costs is omitted from all U.S. analyses, such as that of McAfee *et al* quoted in the Consultation Paper, since a cost-shifting rule does not apply in U.S.A. But it does apply almost everywhere else across the world, and in U.K. jurisdictions.

¹¹ C Hodges, J Peysner and A Nurse, *Litigation Funding. Status and Issues* (Centre for Socio-Legal Studies, Oxford and Lincoln Universities, 2012), at <http://www.csls.ox.ac.uk/documents/ReportLitigationFunding.pdf>.

¹² For example, chemical cartel cases in various EU jurisdictions are funded by Brussels-based CDC, and air freight cartel cases are funded by Dublin-based (and Australian-funded) Claims Funding International: see C Hodges, J Peysner and A Nurse, *Litigation Funding. Status and Issues* (Centre for Socio-Legal Studies, Oxford and Lincoln Universities, 2012).

There have been many statements by European and UK ministers and civil servants that collective actions give rise to a risk of abuse. The reasons for this lie in a ‘toxic cocktail’ of features whose initial purpose is to incentivise private funders of litigation (no or limited loser pays, contingency fees, one way cost shifting, high damages, collective action procedures, assumed loss rules, and other features). The abuse problems arise where the financial incentives for intermediaries are sufficiently large as to produce a risk of behaviour by funders or lawyers is unacceptable, and to make it cheaper for defendants to settle cases of lesser merits at an overvalue.

In view of the risk of a ‘toxic cocktail’ of collective litigation, with unacceptable abuse, there is a clear consensus that safeguards would be necessary in collective actions: statements to that effect have been made by the European Commission,¹³ the European Parliament,¹⁴ consumers¹⁵ and business.¹⁶

The UK government has also clearly supported the need for balanced safeguards to guard against the risks of abuse and cases with poor merits, and has declined to consider any collective action mechanism save for competition damages cases.¹⁷ It was concern about the risks of abuse that led the UK government to drop¹⁸ proposals¹⁹ to introduce a representative action procedure in 2001.²⁰

¹³ Amongst many statements to this effect by EU leaders, see European Commission DG SANCO, MEMO/08/741, 2009, p 4: ‘The U.S. style class action is not envisaged. EU legal systems are very different from the U.S. legal system which is the result of a ‘toxic cocktail’—a combination of several elements (punitive damages, contingency fees, opt-out, pre-trial discovery procedures)... This combination of elements – “toxic cocktail” – should not be introduced in Europe. Different effective safeguards including, loser pays principles, the judge’s discretion to exclude unmeritorious claims, and accredited associations which are authorised to take cases on behalf of consumers, are built into existing national collective redress schemes in Europe.’

¹⁴ European Parliament resolution of 2 February 2012 on ‘Towards a Coherent European Approach to Collective Redress’ (2011/2089(INI)), at <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2012-0021&language=EN&ring=A7-2012-0012>, which stated: ‘(Notes the efforts made by the U.S. Supreme Court to limit frivolous litigation and abuse of the US class action system.. stresses that Europe must refrain from introducing a U.S.-style class action system or any system which does not respect European legal traditions ... 20. Reiterates that safeguards must be put in place within the horizontal instrument in order to avoid unmeritorious claims and misuse of collective redress, so as to guarantee fair court proceedings, and stresses that such safeguards must cover, inter alia, the following points: Standing ..., full compensation for actual damage ..., access to evidence ..., loser pays principle ..., No third party funding.’

¹⁵ See *Collective Redress. Where & how it works* (BEUC, 2012): ‘BEUC has long advocated that any European system should have carefully inbuilt safeguards to guarantee only meritorious cases are considered and exorbitant damages are avoided... To begin with, cases must prove they are well-founded before being fully heard. In court, a judge—not a jury—will hear the facts and evaluate compensation, thereby deciding cases strictly in accordance with the law. Thirdly, punitive damages would be unavailable. This prevents excessive settlements and victims would be compensated for the actual loss suffered.’

¹⁶ See *EJF Key Messages*, European Justice Forum, 23 February 2009, at <http://europeanjusticeforum.org/storage/EJF%20KEY%20MESSAGES.pdf>: ‘If collective litigation is unavoidable, there must be safeguards to avoid abuse’.

¹⁷ Statement of policy by E Knight, Ministry of Justice, at the Danish Presidency Collective Actions Conference, Copenhagen, March 2012.

¹⁸ *Consultation Response: Representative Claims: Proposed New Procedures* (Lord Chancellor’s Department, 2002).

¹⁹ *Representative Claims: Proposed New Procedures, A Consultation Paper* (Lord Chancellor’s Department, 2001).

²⁰ See C Hodges, ‘From Class Actions to Collective Redress: A Revolution in Approach to Compensation’ (2009) *Civil Justice Quarterly* 41, at 50.

In July 2009 the UK government firmly rejected a proposal by the Civil Justice Council (CJC) that a generic class action rule should be introduced,²¹ and stated that any changes should be on a sector-by-sector approach and involve strenuous review of the ADR and regulatory options within each sector.²² The government criticised the CJC's failure to produce empirical evidence of need at that stage.²³ It expressed clear preference for settlement and regulatory-oversight approaches to dispute resolution over litigation-based approaches.

The Government's Response to the CJC included the following points:²⁴

- Rights of action should be introduced only where there is evidence of need and following an assessment of economic and other impacts and consideration of alternative approaches.
- In particular, regulatory options should be considered before introducing court based options. For example, in some sectors it might be appropriate to give regulators power to order the payment of compensation ('regulation plus'). This has since been introduced with considerable success in various sectors including financial services, communications, utilities, but the technique does not seem to have been understood by the competition enforcement authority.
- The existence of effective ADR mechanisms in any collective action procedure will be crucial. So too will strong case management by the court, including merits and cost-benefit criteria.
- The 'loser pays' principle for costs should be maintained to help deter unmeritorious litigation.
- The Government would develop a framework document setting out the issues to be addressed when introducing a right of collective action, with options and, where appropriate, a preferred approach. This will act as a 'toolkit' for policy makers and legislators. However, no such framework document has been published.

These points seem largely to have been ignored in the proposals under review.

²¹ "Improving Access to Justice through Collective Actions" *Developing a More Efficient and Effective Procedure for Collective Actions. Final Report. A Series of Recommendations to the Lord Chancellor* (Civil Justice Council, 2008) at <http://www.civiljusticecouncil.gov.uk/index.htm>.

²² *UK Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'*, Ministry of Justice, July 2009, at <http://www.justice.gov.uk/about/docs/government-response-cjc-collective-actions.pdf>. The key to CJC's approach is that it was originally designed to attract collective cases to be resolved in the UK's courts, and in the belief that that would be good for the UK judicial system and London legal services market, and that business would welcome having an efficient jurisdiction in UK. The CJC failed to recognise that neither business nor government in fact welcomed the prospect of a potentially large increase in major litigation, especially the risk of generating claims of poor merit and high transactional cost. An economic analysis of the proposals would be that it was an attempt by the intermediaries of a particular mechanism to capture exclusivity for that mechanism, so as to seek rents from it. But the government took a wider view of the available pathways and their respective merits, and chose differently.

²³ The CJC had relied on a study by Professor Rachael Mulheron, which concluded that there was overwhelming evidence of need, but which the Ministry of Justice considered related essentially to foreign situations, and evidence was not produced of the English and Welsh landscape of non-court mechanisms and regulatory mechanisms.

²⁴ This and the above paragraph are taken from C Hodges, 'Collective Redress in Europe: The New Model' (2010) *Civil Justice Quarterly* 370.

7. UK's introduction of a series of measures that increase the risk of abusive litigation, risking driving business investment abroad, and damaging economic recovery

European governments have been sufficiently concerned about the risks of abuse for two reasons. Firstly, abuse would damage confidence in the operation of the legal system through producing unjust outcomes. Secondly, the international business community is highly sensitised to the risk that a particular jurisdiction may become an unattractive business venue because of the risk of high and unjustified litigation costs.

The U.K. government is well aware of the second risk. It has claimed consistently that it wishes the U.K. to be 'open for business' in order to stimulate growth so as to recover from the economic crisis.²⁵ A recent statement was:

'Growing our economy out of a period of acute crisis is the most pressing issue for this Government. We want to make sure the right conditions are in place to encourage investment and exports, boost enterprise, support green growth and build a responsible business culture. The measures in the Enterprise and Regulatory Reform Bill will help make Britain one of the most enterprise-friendly countries in the world.'²⁶

Yet at the same time the government has taken a series of decisions in relation to litigation that increase the risk of litigation, and have been interpreted by international businesses that the UK is becoming a risky and unfriendly environment:²⁷

- a. Extending contingency fees from Employment Tribunals to *all types* of claims (as 'Damages Based Agreements').²⁸
- b. Introducing Qualified One Way Cost Shifting (QOCS) for personal injury cases.²⁹
- c. Failing to regulate private 'Third Party' Litigation Funders.
- d. Proposing to introduce a collective action procedure—with an opt-out mechanism.³⁰

Each of these measures constitutes one of the elements that has previously been widely identified as a significant component of the 'toxic cocktail'. Taken together, these reforms

²⁵ *The Plan for Growth* (HM Treasury and Department for Business Innovation & Skills, 2011); *Business Plan 2011-2015* (Department for Business Innovation & Skills, 2011). *Better Choices: Better Deals. Consumers Powering Growth*. (Department for Business Innovation & Skills and Cabinet Office Behavioural Insights team, 2011); *A Competition Regime for Growth: A Consultation on Options for Reform*, (Department for Business Innovation & Skills, 2011).

²⁶ Business Secretary Vince Cable, press release launching the Enterprise and Regulatory Reform Bill, May 2012.

²⁷ Note publications such as *Plan for Growth: Promoting the UK's Legal Services Sector* (Ministry of Justice, September 2011).

²⁸ The Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 45, amending s 58AA of the Courts and Legal Services Act 1990. A CJC Working Party is currently considering whether to impose a cap on the 'success fee' percentage in commercial cases; it has already been decided there will be a cap of 25% in personal injury cases: see the CJC's press release, which curiously refers simply to DBAs in 'civil litigation', without mention of it being limited to personal injury cases alone: <http://www.judiciary.gov.uk/Resources/JCO/Documents/CJC/Publications/Other%20papers/cjc-press-rel-wp-contingency-fees.pdf>

²⁹ The Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 45.

³⁰ *Private Actions in Competition Law: A Consultation on Options for Reform* (Department for Business Innovation & Skills, 2012). Opposition to this proposal was voiced by business on the same day that the proposals were published: press release, Confederation of British Industry, 22 May 2012.

will clearly lead to an increase in litigation, which will inevitably include a significantly increased risk of abuse. The extent to which the U.K. stands out from its competitors in these respects is clear. No other European state has gone so far in promoting litigation. The government should not be surprised that its policies have given rise to serious alarm in the business community. The U.K. now stands out as a jurisdiction that is ‘open for litigation’ and not ‘open for business’. The adverse implications for growth of the economy, and national economic recovery, deserve wide-spread and serious consideration.

In relation to competition claims, the risk primarily relates to increasing stand-alone litigation. Follow-on litigation inherently includes a safeguard that the merits of a case have been established by the regulatory authority and/or a court. Stacking the balance of power in favour of follow-on claimants increases the possible speed and quantum of settlement. But in stand-alone cases, stacking the economic incentives in favour of claimants and their funders increases the risk that cases will be settled by defendants at an over-value compared with their merits (producing over-deterrence).

The scale of possible disinvestment in the U.K. that could be produced by even a minor change in the attitude of business towards this country as a jurisdiction in which the cost of doing business includes a litigation premium, especially on unjustified cases, far outweighs the possible benefits identified by the government in its Impact Assessment, which are at best modest in scale. Adverse comments emanated from abroad as soon as this Consultation was issued, and have continued with mounting incredulity.

The perception that the litigation environment is now unfriendly and unjust is built on the risk that the combination of factors such as contingency fees and an opt-out rule would attract entrepreneurial lawyers and funders into launching large *stand-alone* collective actions in which the cost of settling would outweigh the cost of defending, and the result would be abusive ‘blackmail settlements’ that have poor underlying merits.

8. Problems with an opt-out mechanism: creating an exception to the European consensus against opt-out, and technical inoperability with litigation funding

It is theoretically tempting for the government to propose an opt-out rule, in order to try to deliver redress to as many class members as possible, and to maximise deterrence. However, the opt-out approach in private actions has serious defects in practice.

First, in proposing an opt-out rule, the U.K. would be introducing one of the key safeguards that are widely considered essential to guard against abuse.

There is clear consensus across European Member States against the opt-out principle.³¹ The reason is that opt-out is rightly regarded as one of the major elements that cause major abuse in collective litigation, notable blackmail settlements that have no merit but impose major cost.

³¹ The European Parliament’s resolution of 2 February 2012 stated: ‘a collective redress system where the victims are not identified before the judgment is delivered must be rejected on the grounds that it is contrary to many Member States’ legal orders and violates the rights of any victims who might participate in the procedure unknowingly and yet be bound by the court’s decision’.

If it were to adopt an opt-out rule, the U.K. would be taking a major and visible step out of line with the EU consensus. As noted above, the consequence would be that the U.K. would be seen by business as an unattractive location for investment, on the basis that it would risk being tarred as a venue for speculative forum shopping litigation that could then be enforced throughout Europe. That might be good for lawyers, but would undermine financial services and other industrial sectors that are regarded as strategic priorities for the U.K. to try to retain.

Secondly, the opt-out rule sets a dangerous precedent nationally. It is just not convincing for the government to say ‘Don’t worry, we will limit opt-out to competition cases in the CAT’. That may be technically correct, but the reality is that if any Member State were to introduce an opt-out rule for any type of collective action, it would be regarded as having major symbolic impact. It would be seen by many as a hugely significant precedent, both nationally and across the EU, for everyone to follow suit in relation to collective actions for all types of cases, not just competition. The introduction of an opt-out rule by the UK would have impact across the world, and any technical limitation would be of little impact.

Thirdly, there are practical and technical reasons why an opt-out rule would not succeed in achieving the stated objective. Experience in Australia has clearly shown that the opt-out class action just does not work for litigation funders. The Australian Full Federal Court had to reverse the statutory opt-out rule and permit an opt-in approach in order to make the arrangements work for litigation funders, since there would otherwise have been a ‘free rider’ problem of claimants who did not sign up with the funders, which would have made the action commercially unworkable by them.³² Further, evidence from U.S.A. is that where a common settlement fund is agreed as part of a settlement, the percentage of consumers who opt in (to what began as an opt out class) to collect their shares is low.³³

Similarly, it is not possible to combine an opt-out regime with the English ‘loser pays’ rule unless a single representative can be liable for the defendants’ costs. The loser pays rule is a crucial safeguard against abuse and injustice. It is theoretically possible for a single representative to assume the adverse costs liability, but that representative must have appropriate assets. Few individual class members would assume such a risk. An intermediary such as a funder, lawyer or insurer might in theory assume the risk, but would only do so if the chances of success and potential returns were high. Such arrangements would probably only apply for follow-on claims, involving large individual losses (not mass dispersed losses), in B2B cases (not consumer or SME cases), and where the victims’ damages were significantly reduced by the intermediary’s fees. But as the Australian experience shows, an opt-out regime is unworkable for independent funders. By contrast, in an opt-in regime, all class members would sign up to a funding agreement and (at least in theory). But in practice, a funder will require extensive sign-up of class membership so as to make its commercial situation sufficiently attractive and watertight.

³² *Multiplex Funds Management Ltd v P Dawson Nominees Pty Ltd* (2007) 164 FCR 275. See M Legg, E Park, N Turner and L Travers, ‘The Rise and Regulation of Litigation Funding in Australia’ (2011) 38.4 *North Kentucky Law Review* 625.

³³ NM Pace, SJ Carroll, I Vogelsang and L Zakaras, *Insurance Class Actions in the United States* (RAND Institute for Civil Justice, 2007).

9. The inevitable policy conundrum of collective actions. Either collective actions risk major abuse and disinvestments, or they actions will not work in delivering more damages because of the ‘Catch 22’ problem.

There is a clear and unavoidable ‘catch 22’ for proposals that involve a private collective action technique. If acceptable safeguards are put in place to prevent abuse (which are generally thought to include effective loser pays, opt-in, certification of the merits of a case, individual proof of loss, court approval of settlements and other levers), the financial incentives would not be sufficient to attract investment in collective cases. As outlined above, that would especially be true for cases involving small damages, such as for consumers and SMEs. In these circumstances, a private collective action regime would fail to achieve its objectives. The whole point about an effective private enforcement regime is that it has to have high incentives to attract funders. But it is exactly the size of the financial elements and incentives that gives rise to concern about conflicts of interest and the risk of abuse. The higher the incentives, the higher the concern. But unless the incentives are high, there will be no funding. It is a classic ‘catch 22’.³⁴

Furthermore, all the evidence shows that collective action procedures that have adequate safeguards against abuse *take a very long time* and *cost a great deal of money*, partly defeating the purpose of delivering damages where they are due. This means that a responsible approach before proceeding further would be to examine whether other options for delivering redress exist and would be preferable. Other options do exist, that involve far less risk and also offer the promise of delivering redress more swiftly, cheaply and widely than a litigation mechanism. But if those options are to be truly effective, some ‘sacred cows’ that have been held by the OFT need to be put out to grass.

10. Significantly increasing private enforcement requires reform of the enforcement policy that is based on fines, which has not been addressed in the consultation.

The current competition enforcement system is moving from a system of fines alone to a system in which damages are expected to be paid in more cases as well as fines. That change leaves the system open to challenges based on the fact that defendants will in future be paying more than before, since they will be subject to both fines and damages. Since fines have historically been set at levels which public policy has deemed sufficient punishment and sufficiently deterrent, defendants will argue that they have manifestly been treated disproportionately and in breach of their human rights.³⁵

Other inconsistencies also arise. Sometimes, defendants will pay damages and sometimes they will not. Sometimes, they might pay less than full compensation (wide anecdotal evidence from competition litigators is that this happens often: settlements are commercial deals and bear little scientific relationship to actual losses and merits). If the fines always

³⁴ These points are expanded further at C Hodges and R Money-Kyrle, *Safeguards in Collective Actions* (Foundation for Law, Justice and Society, 2012), at www.fljs.org/ECJSPublications and in a forthcoming article.

³⁵ The most relevant provisions are the prohibition of disproportionality of the severity of penalties for criminal offences (art 49) of the Charter of Fundamental Rights of the European Union (2000/C 364/01), but see also the principle of The equality before the law (art 20, non-discrimination (art 21), right to having affairs handled fairly by public authorities (art 41); see further the European Convention on Human Rights, prohibition against discrimination (art 14 and Protocol 12 art1), prohibition on imposing a heavier penalty than the one that was applicable at the time the criminal offence was committed (art 7).

remain set in advance of the damages, that will lead to injustice and unbalanced markets.³⁶ Sometimes, fines might not be paid at all, but some damages might be paid. The overall effect on rebalancing a competitive market is unpredictable and fortuitous. It would bring the responsible authority into disrepute.

Follow-on actions involve an inherent and avoidable duplication of costs where private enforcement (for damages) unnecessarily follows public enforcement (findings of infringement and imposition of fines).

11. The attraction of ‘private enforcement’ in the competition world is based on a series of false premises. At the root of the misperception is a preoccupation with ‘deterrence’ as the sole objective of enforcement. Yet enforcement theory and policy in almost every other type of business regulatory context (excluding the closed competition world) has evolved from ‘deterrence alone’ to adopt other more sophisticated—and effective—enforcement theories and policies. If the competition world were able to take a close, objective look at itself, it would see that it is badly in need of an independent review of its theories and approaches.

Further, the adoption of other enforcement approaches in other sectors has been accompanied by the adoption of restorative justice as an integral part of public enforcement. In other words, keeping public and private enforcement separate from each other is an old fashioned and inefficient approach, but the European approach is the *converse* of the U.S. private-enforcement-of-public-norms approach. Public agencies that are responsible for enforcement of non-competition law are now achieving payment of restorative compensation very quickly indeed, and at low cost and with great efficiency in terms of public resource and expenditure. Such approaches *avoid* any need for private enforcement in relation to damages. It is time that the new CMA was subject to an independent and objective review in relation to its enforcement policy.

I will set out full substantiation for these arguments in a forthcoming work, and merely make the following points here:

- a. UK government policy and law includes requirements on regulators that are being adopted by almost all regulators *apart* from those responsible for competition enforcement. The requirements include risk-based and responsive regulation, minimising burdens on business, promoting self-regulation, achieving compliance through education, eliminating financial gain or benefit from non-compliance (restorative justice). The exclusion of competition enforcers from these requirements appears unjustifiable and arguably illegal.³⁷ The OFT is itself schizophrenic as between enforcement of consumer³⁸ and competition law.

³⁶ For an analysis of various problems see Michael J Frese, ‘Fines and Damages under EU Competition Law- Implications of the Accumulation of Liability’ *World Competition* 34, no 3 (2011): 397-432; and D Geradin, *Discussion Paper. The EU Competition Law Fining System: A Reassessment* (Covington & Burling LLP & Tilburg University, October 2011), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1937582 .

³⁷ Relevant sources include: The Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 63, amending the Powers of Criminal Courts (Sentencing) Act 2000, s 130(1); Hampton, *Reducing administrative burdens: effective inspection and enforcement* (H M Treasury, 2005); See also *Less is More: Reducing Burdens, Improving Outcomes* (Better Regulation Task Force, 2006); HM Treasury, Better Regulation Executive, and Cabinet Office, *Implementing Hampton: from enforcement to compliance*, November 2006; R Macrory,

- b. There is now a considerable body of scholarship and research on regulation and enforcement,³⁹ none of which has been noted, still less integrated, within the closed world of competition law. The latter remains dominated by theories that are regarded as obsolete in other sectors. An enforcement theory based on deterrence alone is simply discredited by this scholarship. But the competition world has not noticed this.

It may be argued in response that breaches of competition law are different from other regulated regimes. That argument is looking very thin in the light of developing experience and practice. An emphasis on compliance regimes instead of deterrence alone is emerging as not only more effective but also cheaper.

12. Since there are so many problems with a privately funded private collective action technique for seeking competition damages, that approach should only be introduced as a last option. There are various other options that are far less risky and far more likely to deliver the policy objectives. The government is ignoring the solutions that are available that could avoid all these problems. Hence, the government is wasting a major opportunity to enhance economic recovery.

What is needed is one or more robust mechanisms to bring about swift and low cost solutions to competition damages cases. The empirical evidence suggests that B2B damages claims are increasingly made and settled. The problem remains small dispersed claims, involving consumers or SMEs. A litigation procedure would not solve that type of case, nor would it significantly increase the number of stand-alone cases. Where a potential case arises involving mass small losses, no evidence has proved that it would be *identified and proved* solely by private actors. If that is correct, the CMA may well need to be involved in investigating, and clarifying whether or not there has been breach.

The techniques that *do* succeed in delivering *fast, cheap and effective* compensation are:

- a. to use the power of a public regulator to require or incentivise companies to make restitution (a public oversight power),
- b. thereby or otherwise, to incentivise companies to use ADR (or other external assistance) to make acceptable proposals for compensation.

ADR techniques and ombudsmen and are spreading across European civil justice and regulatory systems extremely quickly—because they deliver fast, cheap, accessible and

Regulatory Justice: making sanctions effective (HM Treasury, 2006); The Legislative and Regulatory Reform Act 2006; The Legislative and Regulatory Reform (Regulatory Functions) Order 2007, SI 2007/3544; *Regulators' Compliance Code: Statutory Code of Practice for Regulators*, (Department for Business, Enterprise and Regulatory Reform, 2007); the Regulatory Enforcement and Sanctions Act 2007; *Principles for Economic Regulation* (BIS, April 2011).

³⁸ See *Consumer Law and Business Practice. Drivers of compliance and non-compliance* (Office of Fair Trading, 2010), OFT1225; *Statement of consumer protection enforcement principles* (Office of Fair Trading, 2010), OFT1221.

³⁹ A recent compilation of scholarship is C Parker and V Lehmann Nielsen, *Explaining Compliance. Business Responses to Regulation* (Edward Elgar, 2012).

effective solutions.⁴⁰ The government's previous support for ADR in relation to collective redress has been noted above.⁴¹

It is always faster and cheaper for firms to pay voluntarily. So the objective should be to incentivise or force this, whenever there has been an infringement. Both techniques a. and b. above are proposed in the consultation, albeit with insufficient prioritisation. Evidence is mounting that the public oversight power can be used with great effect in far more circumstances than the consultation suggests. It has been adopted by an increasing number of other regulators, and the OFT is looking isolated in not embracing the technique and producing fast, cheap and effective outcomes. An important reason why the approach works for other regulators is that they have more modern (and more effective) enforcement policies than 'deterrence alone', as noted above. The power would inherently incentivise an enhanced ADR or adjudicative technique, and provide a far greater incentive to achieve a swift and fair settlement than the cumbersome Leviathan of collective private litigation.

The failure of the current approach is illustrated by the recent *Cardiff Bus* case,⁴² in which OFT expressed the view that there might be an infringement but declined to act as the level of detriment was not large. A private action was subsequently fought at huge cost, over some years, resulting in a recent CAT award of £34,000 in compensatory damages plus loss of interest, which was clearly grossly uneconomic in terms of cost-benefit. Some time before the award, the smaller competitor had gone out of business. It would have been far more effective if OFT had used 'restorative oversight' powers to persuade the dominant company to make a modest payment at the time that the infringement was identified, which was when the smaller competitor needed help and consumers would have benefitted.

A technique that could usefully be added is a power for the court to approve an agreed settlement, on the precedent of the highly successful and admired Dutch Mass Claims Settlement Act 2005. This does not involve a 'front end' (certification) power to start a collective action, thereby avoiding the issues of abuse and frightening inward investment.⁴³ The Dutch evidence is that its settlement procedure incentivises ADR. The culture of fighting claims is changing, but opportunities to negotiate settlements are impeded by the inability to bind all parties, which is what the Dutch Act does, and UK needs. Adopting this would also maintain strong competition in the international market for settlement venues (i.e. the CAT). This regime should be tried for 5 years. If there is evidence of need after 5 years, and damages claims are not being settled where they should be, then the position can be revisited. But otherwise, making too many changes at once is rarely a good idea.

CONCLUSION

⁴⁰ C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012).

⁴¹ *UK Government's Response to the Civil Justice Council's Report: 'Improving Access to Justice through Collective Actions'*, Ministry of Justice, July 2009.

⁴² *2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19. The CAT also awarded £60,000 in exemplary damages.

⁴³ Indeed, in other non-competition mass claims in England and Wales, the courts have moved away from the need to certify GLOs in the past few years, since the CPR requirements of settlement and case management make them unnecessary (a leading example is the Buncefield litigation, where a GLO was refused).

The government should:

- 1. Reject an opt-out mechanism.**
- 2. Undertake an independent review of competition enforcement policy, examining why the enforcement authority should not adopt the same risk-based, responsive and restorative approach that the government has applied by law to almost every other regulator. This review would examine a compliance-based approach towards competition law, in line with government policies on self-regulation and ‘better regulatory’ enforcement.**
- 3. Encourage business to construct an effective ADR/adjudicatory compensation system.**
- 4. Once those provisions are in place, measure the level of unmet need, and if resultant need is established, at that stage introduce a private action approach available only as a last resort.**

B. RESPONSES TO QUESTIONS ASKED

CAT PROPOSALS

BIS PROPOSAL	RESPONSE
Activate S.16 of the Enterprise Act to enable the courts to transfer competition cases to the CAT	Yes
The CAT to be allowed to hear stand-alone as well as follow-on cases	Yes
Whether the CAT should be able to grant injunctions	Yes
Whether to introduce a Fast Track procedure so SMEs can resolve simpler cases more quickly and at lower cost, including: <ul style="list-style-type: none"> - Waiving or limiting cross-undertakings in damages - Target to hear cases within 6 months - No or limited court fees and costs capped at £25K 	Support a fast track, but not support cost capping or waiving cross-undertakings, which introduce arbitrary potential for abuse.
Whether to introduce a rebuttable presumption of loss for cartel cases to shift burden to the defendant, who is most likely to possess the data to calculate the true damages <ul style="list-style-type: none"> - Suggestion this could be 20% 	Strongly oppose as a matter of principle.
Whether the passing-on defence should be addressed by legislation.	No

COLLECTIVE ACTIONS QUESTIONS

BIS QUESTION	RESPONSE
Allow collective actions to be brought on behalf of businesses as well as consumers?	Not necessary: existing case management procedures exist.
Allow collective actions to be brought in stand-alone as well as follow-on cases?	Only if the private action is available after viable alternatives (regulation and ADR) are not available.
Allow opt-out collective actions to be brought in the CAT, subject to CAT's discretion?	Object: opt-out will not work.
Allow opt-out collective actions to be brought by private bodies, using a strong certification regime so that the representative body was suitably representative of the claimants?	No: clear risk of abuse.
Are law-firms and third-party funders (TPFs) suitable representatives?	No

Should a public body be able to bring an opt-out collective action?	Yes
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ENCOURAGING ADR

BIS QUESTION	RESPONSE
Should ADR be made mandatory?	No: illegal under ECHR art 6.
Should a pre-action protocol be introduced for: <ul style="list-style-type: none"> - The proposed fast track - Collective actions - All cases in the CAT? 	Yes
Should the CAT rules governing formal settlement offers be amended to bring the CAT in line with High Court procedures?	Yes
Should there be court approved settlement scheme similar to that in the Netherlands?	Yes
Should the competition authorities be able to order a defendant to implement a redress scheme, or to certify such a voluntary redress scheme?	Yes
Should redress be taken into account in setting the level of fine?	Yes

COMPLEMENTING THE PUBLIC ENFORCEMENT REGIME

BIS QUESTION	RESPONSE
How can private actions complement public enforcement?	Policy on public enforcement needs to be fundamentally reviewed. If regulatory practice were adopted for competition that is now standard for all other areas, private enforcement would be largely unnecessary.
Should certain leniency documents be protected from disclosure in subsequent litigation?	Yes. But current leniency policy needs to be radically reviewed. There would be no problem if public enforcement worked properly and included restoration.
Should whistleblowers and any other leniency recipients be protected from joint and several liability?	No.
Should decisions of other NCAs be binding in the UK?	Yes.