

Delivering Competition Damages in UK

Christopher Hodges*

This paper examines the system for delivering compensation for breach of competition law that would apply to claims if the proposals contained in 2012 consultation by the U.K. government came into effect. It examines how the system would operate in practice, and how an individual or collective claim would be dealt with. The position involves incorporating various innovative techniques from the three pillars of public enforcement, and private enforcement and ADR, each of which individually constitutes a significant reform, into a sophisticated pre-existing system. The result is complex and untested, not least because the details of every one of the major individual techniques are yet to be defined. The paper examines crucial influence that the incentives and powers (carrots, nudges and sticks) that would apply in each situation would have on how a claim is processed, or which impede it. It finds that the ADR and regulatory techniques can offer transformative solutions in delivering compensation. Whilst a private class action could operate in follow-on mass cases, it would be unnecessarily slow and costly compared with intelligent use of the ADR and regulatory alternatives. Significant concerns are identified over whether a class action would be effective in stand-alone or mass consumer cases. Accordingly, it suggests that policymakers should re-examine priorities as between private enforcement and other options.

A. INTRODUCTION: A PRACTICAL ANALYSIS

There has been lengthy debate over the mechanisms to deliver damages for infringements of competition law. The U.K. government has proposed to introduce a wide range of significant reforms to the existing system of enforcement of competition law, as outlined in its 2012 Consultation on private actions.¹ The principal innovations that are proposed are:

- introduction of a power to facilitate restoration exercisable by the public regulatory authority;
- encouragement of resolution of claims between the parties informally, outside the court, through 'alternative dispute resolution' (ADR) techniques;
- introducing a private opt-out collective action for mass claims.

* Erasmus Professor of Fundamentals of Private Law, Erasmus University, Rotterdam; Head of the CMS Research Programme on Civil Justice Systems, Centre for Socio-Legal Studies, University of Oxford; Life Member, Wolfson College, Oxford; Solicitor.

¹ *Private Actions in Competition Law: A Consultation on Options for Reform* (Department for Business Innovation & Skills, 2012), ('the Consultation') at <http://bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf>. See also *Impact Assessment. Private Actions in Competition Law: A Consultation on Options for Reform* (Department for Business Innovation & Skills, 2012), ('the Impact Assessment') at <http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-743-private-actions-in-competition-law-impact-assessment>

Much attention has focused on the proposed private mechanism,² which would be an innovation both in the U.K. and in European legal systems generally. The public power would also be an innovation in the U.K. competition area, but is not new in other areas, nor in some other countries. ADR has become familiar in general litigation in England and Wales during the past decade,³ and hence has been used in some competition claims, but competition-specific ADR is now contemplated, which may involve particular techniques and structures, so this aspect is also new. Overall, each of the three techniques involves significant reform, so deserves attention.

Hitherto, each of these new techniques has been considered (as they were in the Consultation) individually. Yet in practice, none of them will operate in a vacuum. Accordingly, this paper proceeds by asking the question of how the likely future system will work in practice, setting each technique in its practical, procedural and systemic context. That approach enables a view to be taken of how the techniques will work *together* as part of a holistic system. It also enables some light to be shined on the advantages and disadvantages of the individual techniques, and it thereby illuminates likely outcomes for delivering compensation, and hence policy conclusions on the way forward.

The analysis will proceed on the basis of two assumptions. First, it is assumed that an infringement—or the likelihood that an infringement has occurred—has been identified. In practice, identification of some types of infringements may be a step that presents not only a considerable challenge but also impacts significantly on the techniques considered here. For example, determining whether particular conduct has amounted to an illegal act may take considerable effort, and may impact on negotiations relating to whether compensation will be paid. In the competition context, proving dominance and unpassed-on damage can be challenging. In the context of public procedures, negotiations might involve a ‘plea bargain’ perhaps including a restorative element. In the context of a private action, negotiations might involve agreeing a discount on damages claimed, based on the uncertainty of both sides as to whether a court would finally hold some or all of the actions complained of to be illegal and to give rise to what level of compensation.

Secondly, the analysis will assume that the enforcement policy that applies to public enforcement of competition law is aimed at deterrence, and that applicable to private claims is essentially aimed at compensation for damage. This author has grave reservations about deterrence as a sole enforcement policy, but such issues will not be addressed here.⁴

Assuming reasonable evidence of an infringement, there would be the following options for achieving payment of compensation for loss:

² References below will include Responses to the Consultation by official, regulatory, consumer, business and legal organisations, which are available on their websites. These will be referred to below as ‘Response by xxx’.

³ The settlement of claims by ADR was a major objective of the Woolf reforms of civil procedure, introduced by the Civil Procedure Rules 1999 (CPR): see A Zuckerman, *Zuckerman on Civil Procedure* (Thomson, 2ed, 2006); D Dwyer (ed), *The Civil Procedure Rules ten Years On* (Oxford University Press, 2010).

⁴ For some criticisms, but not a complete critique, see C Hodges, ‘A Market-Based Competition Enforcement Policy’ [2011] 22.3 *European Business Law Review* 261, and C Hodges, ‘European Competition Enforcement Policy: Integrating Restitution and Behaviour Control’ (2011) 34(3) *World Competition* 383.

1. The infringers would voluntarily agree to pay compensation to those who have suffered loss. This result might be facilitated by independent parties, such as through some form of ADR assistance.
2. A public authority would influence the infringers to pay compensation, or would order them to do so.
3. The defendants would decline to pay compensation, the public authority would decline to be involved in compensation issues, and private parties would be able to bring private actions for damages. This might be facilitated by intermediaries, notably litigation funders and lawyers.

In evaluating these techniques, the criteria that will be applied are the effectiveness of the technique(s) in delivering due compensation, the speed of the procedure, its cost and hence efficiency.⁵ Techniques are usually evaluated only against a policy of maximising access to justice, or ability to assert rights. But it is suggested that where there is a choice between several techniques, the important questions relate to evaluating the outcomes of maximising the achievement of due compensation, speed, cost and efficiency, on a comparative basis. Theoretical comparisons of public and private enforcement have hitherto only compared calculations on the supposed costs of those two methods of enforcement—but *omit* the key criteria of *duration* and the practical realities of *costs and affordability to claimants* and their funders.⁶

This article proceeds by examining the three tracks just identified (parts B to D), and part E draws conclusions. It will be suggested that the private class action technique may offer some solution in follow-on cases, but the same result can be achieved by ADR and regulatory techniques, if they are designed to achieve this. Questions therefore arise about duplication, cost and delay. For stand-alone claims, it is suggested that the theoretical benefits of a class action are unlikely to be realized in practice, in which case the availability of one or more of the other techniques will be essential. In short, the analysis suggests that the Government's ideas need to be revised if compensation is to be achieved in practice when it is due. The context of the analysis is the U.K. legal system, but there are implications for other European jurisdictions.

B. OPTION 1: VOLUNTARY PLUS ADR

It is intuitively clear that the institution by a firm of appropriate voluntary arrangements to pay compensation are likely to be quickest way of achieving that outcome. An appropriate voluntary

⁵ This approach is wider than that implicit in the Consultation, which effectively considered only the ability to assert rights, under the policy of maximising access to justice, but not the question of measuring the outcomes of maximising the achievement of due compensation, speed or cost on a comparative basis. However, the Response by Which? stated 'we agree that the focus now should be on reforming the system such that the consumers and businesses affected are able to obtain redress in a manner that is fair, quick, low cost and efficient' and that by the CBI said 'Collective redress for consumers in competition cases should be delivered speedily and at minimum cost.'

⁶ The Consultation cites 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 omits consideration of duration, and the calculations that it models are based on the U.S. 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]'

solution is also likely to save costs for all (the claimants, the payers, and the state authorities that may be involved, such as regulator or court). By contrast, if public or private legal procedures have to be followed, especially if such mechanisms have to observe ‘due process’ requirements and involve adversarial procedures and a series of formal stages, they are likely to take longer and cost more overall.⁷ In other words, ‘doing the right thing spontaneously’ is better than fighting throughout a lengthy formal procedure and then being compelled to do it.

Further, the earlier a voluntary solution can be implemented, the more will be saved. It may be necessary for public and/or private mechanisms to play some organizational role, but as far as achieving payment of compensation is concerned, it is often the objective to enable the infringing firm(s) to agree an arrangement as quickly as possible under which it/they will implement payment.

If payment of compensation is to be made, assuming liability is accepted,⁸ the following pre-conditions arise:

1. To which payees should payment be made (identification)? This may involve identifying those to whom payment should not be made, including some who make claims.
2. How much should be paid to each payee (quantum)?
3. How to achieve distribution of payment (distribution)?

These three issues may be little problem in some cases, but may present major challenges in others. For example, some firms may hold the necessary information about the identification issue. It may be the direct customers of the firm: an infringing firm should normally know who its direct customers are. Where the number of customers is limited, such as in a vertical restraint of trade the identification issue should present little problem. Some firms will also have electronic records of mass consumer customers, thus solving the identification issue. In some situations, the quantum will be easily identifiable, such as where a small number of payees is involved, or where every payee is due the same amount. However, in other situations, it may be a challenge to satisfy both the identification and quantum issues.

If a legal procedure is followed, it will involve a sequential process towards identification, quantum and distribution, applying logic and law at each stage. In a mass private claim, for example, the main choices for approaching the identification issue lie between requesting individual payees to register (an opt-in approach) and considering that everyone who satisfies criteria are automatically registered but must de-register if they disapprove of a generic settlement reached on their behalf (an opt-out approach towards the class, followed by an opt-out stage before approval of settlement). Distribution of payment may be made either spontaneously by the payer or on the basis of application by individual payees. In some circumstances all this may be thought to be impossible to achieve, or too cumbersome, and some approximated equivalent solution may be applied. An example of an approximated solution was giving every telephone subscriber free calls for a weekend, thereby avoiding the impossible or grossly disproportionate approach of identifying everyone who might be due a small amount, which will

⁷ The CBI Response states: ‘ADR offers a quicker, cheaper form of redress with better outcomes.’

⁸ As noted above, that may be a major assumption in some stand-alone cases. In follow-on cases, the scope of the primary infringement decision may also limit the subsequent damages inquiry.

have differed in every case.⁹ The great advantage of that solution was that it was implementable voluntarily and quickly.

What are the options for a system that aims to induce voluntary payment of compensation? What incentives and/or compulsive forces (carrot and/or stick) would assist in achieving that outcome? The major incentives would be:

- a. To comply with an internal policy on ‘doing the right thing’ and obeying the law, perhaps in accordance with requirements in an internal compliance programme.
- b. To avoid or reduce commercial damage for the firm resulting from damage to its reputation, and even to enhance its reputation by announcing a swift voluntary restoration of a problem that it might claim to have discovered. The impact of this factor will be greater for firms that have high reputations in large markets. Firms that are small, or local, or have low reputations, or reputations for cost-cutting, should be less affected. Thus, this incentive may have force in relation to large retailers, or firms with large consumer brands, but less for lower profile intermediaries like wholesalers.
- c. To achieve a reduction in sanction(s) that will be imposed by the authorities, such as a reduction in a fine, especially if the fine would otherwise be large and the amount of the reduction might be significant. This is similar to the very significant incentives that are currently operated under the leniency policy to induce reporting of a cartel by a whistle-blowing firm, which would receive total immunity from a fine. The justice (fairness and restorative) in such a result may be questionable, but such considerations discounted on the basis infringements would not otherwise be identified and sanctioned.
- d. To avoid or reduce the costs of private litigation, especially if they are high. The impact of this factor will be greater for smaller firms than larger firms that have extensive resources or litigation insurance. It will be lessened if the size of damages payments is

The major compulsions would be:

- e. An order from a court at the conclusion of a private action for damages to make a payment. This compulsion arises in the form of an enforcement order after a civil court judgment.
- f. An order from a regulator to make a payment or put in place a restorative scheme.

The object of the various incentives and compulsions, whether individually or together, is to induce an infringing firm to avoid or cut short a formal process (such as one that would result in levers e or f above) and make a satisfactory voluntary offer of compensation, or engage in settlement negotiations to do so. How, therefore, will the Consultations’ proposed tracks of ADR, regulatory power or private litigation bring to bear incentives and/or compulsions that result in affecting outcomes and, in particular, encouraging the speedy voluntary resolution of compensation issues?

⁹ The Consultation refers to *DECO v Portugal Telecom*. See C Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart Publishing, 2008), p 40.

ADR assistance

How can parties who wish to pay compensation quickly be helped to do this? A range of independent expertise and systems can facilitate all of the key barriers of identification, quantum and distribution issues that were noted above. Alternative dispute resolution (ADR) techniques are now familiar options. ADR has spread widely and quickly in European legal systems, and is continuing to do so. To many people, ADR means a process of mediation that can be invoked before or during private litigation, in an attempt to reach a negotiated solution between existing identified parties. It can encompass a range of types, such as an early neutral evaluation, facilitative conciliation between parties, mediation involving putting forward solutions, or even binding arbitration.

However, the term ADR is also being applied to other architectures than disputes arising in the shadow of the court. Consumer ADR (CDR) is spreading quickly across European Member States as a swift, cheap and effective means of resolving consumer-to-business (C2B) disputes, and is based on an architecture of ombudsmen or other special bodies rather than courts.¹⁰ It is intended that CDR will be available for every type of consumer-to-business (C2B) dispute.¹¹ CDR systems work for contract claims and could be extended for competition claims. They process claims individually but can inherently process mass similar claims. This system might offer opportunities for certain types of C2B competition claims, such as over-pricing, or it might inspire new architectures.

Support for competition-ADR has been expressed by the Government,¹² consumer representatives,¹³ business representatives,¹⁴ lawyers,¹⁵ and some academics.¹⁶ The Government notes that ‘cases being resolved through alternative means, avoiding court involvement, can be a more satisfactory outcome for all parties as well as reducing burdens on the state.... It therefore is minded to ensure that courts and the OFT can use ADR wherever suitable, and to encourage private and third sector bodies to provide further forms of ADR ...’.¹⁷ Thus, it intends to ‘strongly encourage’ ADR, via a ‘nudge’ approach that would make ADR the default first option.¹⁸

¹⁰ See C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012).

¹¹ Commission (EC) ‘Proposal for a Directive on alternative dispute resolution for consumer disputes, COM (2011) 793/2, final, 29 November 2011 and Commission (EC) ‘Proposal for a Regulation on online dispute resolution for consumer disputes’, COM (2011) 794/2, final, 29 November 2011.

¹² Consultation, section 6; see also in general *UK Government’s Response to the Civil Justice Council’s Report: ‘Improving Access to Justice through Collective Actions’*, Ministry of Justice, July 2009.

¹³ Which? Response was to ‘strongly encourage’ ADR use wherever possible.

¹⁴ Responses by CBI, BDI, ILR.

¹⁵ Responses by CLLS (para 1.16), CMS Cameron McKenna.

¹⁶ Response by Hodges. But UEA’s Response objected to ADR, considering that it contradicts the aim of speeding up proceedings, the additional benefits of ADR in competition litigation are doubtful, and could adversely affect general deterrence.

¹⁷ Consultation, para

¹⁸ Consultation, para 6.8.

BusinessEurope has put forward a model of ADR for competition claims, which would involve a Panel of independent experts chosen from a list held by a private sector ADR provider.¹⁹ It has the following main features:

1. it would apply to follow-on claims only;
2. it would be purely voluntary for all, hence all ‘parties’ must agree to use this ADR procedure, and must agree whether outcomes are going to be binding or not;
3. the Panel would set the procedure in each case, but must issue notices to attract potential claimants;
4. only publicly available information would be submitted to the Panel.

Without debating the pros and cons of such a scheme, it is clear that other competition-ADR schemes could be envisaged. A possible simpler version would be for a company to submit all its evidence (maybe internal documents assembled by independent investigators or documents held by authorities that may even remain otherwise confidential) to an independent standing Panel for a determination, or indication, or all or some specific issues, such as liability, size of the class of victims, or total losses or profits. The results could be taken into account in subsequent discussions with either public authorities or representatives of private claimants.

Where the number of claims is sufficiently large and regular, governments have created administrative schemes to process them, as alternatives to the courts. Examples in the U.K. include compensation schemes for miners’ injuries, vaccine damage, and failed financial institutions.²⁰ Some other states have created many more such administrative compensation schemes, which process claims at lower cost than litigation through courts, usually notably swiftly.²¹ Is there sufficient demand for a dedicated competition claims tribunal in the EU or in some Member States?

Other possibilities can be envisaged. EU policy on resolving mass consumer-to-business disputes is to adopt ‘Consumer ADR’ (CDR) systems.²² National architectures on CDR systems vary but usually involve ombudsmen or code-based dispute resolution schemes, of which the existing number is surprisingly large in some Member States,²³ and is expected to grow further.²⁴ Such mechanisms could be expanded both for identifying competition infringements and delivering compensation in some circumstances.

¹⁹ *Structure and Procedure for Alternative Dispute Resolution for Antitrust Damages*, (BusinessEurope, 2012).

²⁰ The Financial Services Compensation Scheme.

²¹ Nordic states are particularly impressive in this respect. See C Hodges, ‘Nordic Compensation Schemes for Drug Injuries’ *J Consumer Policy* (2006) 29:143-175; and chapter on Sweden in C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012).

²² See *Communication by the European Commission on "Alternative Dispute Resolution for consumer disputes in the Single Market"*, COM(2011) 791/2.; Proposal for a Directive of the European Parliament and of the Council on alternative dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Directive on consumer ADR), COM (2011) 793/2; Proposal for a Regulation of the European Parliament and of the Council on online dispute resolution for consumer disputes (Regulation on consumer ODR), COM(2011) 793/3.

²³ C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012).

²⁴ C Hodges, ‘Current discussions on consumer redress: collective redress and ADR’ ERA Forum ERA Forum: Volume 13, Issue 1 (2012), 11-33, also DOI 10.1007/s12027-011-0245-5 (May 2012).

The CBI asserts that ADR can provide effective redress on its own, without any ‘big stick’ compulsion, and should be the principal means by which consumers can achieve collective redress.²⁵ Mulheron and Smith suggest that

‘infringers ought to be given the opportunity to offer redress schemes voluntarily before they are imposed: many companies will, we believe, wish to be seen to make good the harm caused to restore their reputations and will wish to avoid an *order* if at all possible. This will particularly be true where an undertaking applies for immunity or seeks to settle a public enforcement proceeding.’²⁶

Adverse publicity can be a powerful incentive on firms that value their reputation. An example can be seen in RBS Group’s establishment of voluntary compensation arrangements to customers within a few days of its computer systems fault in daily processing in June 2012.²⁷ The CBI and BDI note that ADR can be incentivised by integration with the enforcement policies of OFT/CMA. In particular:

- a reduction in fines (a standard fixed amount, to avoid the CMA having to make a detailed assessment);
- allocating some portion of a fine to redress;
- limiting further liability, changing the rules on joint and several liability;
- approval by the CAT of a collective action scheme.

The City of London Law Society (CLLS) suggests²⁸ that the CAT Rules on formal settlement procedures should be amended, as they currently provide little incentive for either side to settle. 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.

In addition to assistance with identification, quantum and distribution issues, external or ADR techniques may be needed to facilitate determinations of liability (or the percentage risk that the claim will or will not succeed) and with making any outline agreement binding on as many class members as possible. For the former, neutral evaluation or similar techniques can assist. For the latter, the courts or a regulator can assist.

The most striking facilitation of making a settlement scheme binding on inactive class members is the Class Action Settlement Law (WCAM) 2005, which has operated in The Netherlands.²⁹ Representatives on the claimant side (usually a consumer association, shareholders’ foundation or specially created foundation) negotiate a settlement of multiple claims with the defendants, and a special procedure is then started in the Amsterdam Court of Appeal for its approval. The Court approves a public notice, which outlines the proposed terms and states a hearing date, at

²⁵ Response by CBI.

²⁶ Response by Mulheron and Smith.

²⁷ See the exchange of letters between the House of Commons treasury Committee, Chief Executive of RBS and Chairman of the Financial Services Authority at <http://www.parliament.uk/business/committees/committees-a-z/commons-select/treasury-committee/news/treasury-committee-publishes-letters-on-rbs-it-failures/>.

²⁸ CLLS Response

²⁹ C Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart Publishing, 2008), p 70ff. F Weber and WH van Boom, ‘Dutch Treat: The Dutch Collective Settlement of Mass Damage Act (WCAM 2005)’ (2011) 1 *Contratto e Impresa/Europa*, 69-79.

which parties have the opportunity to be heard. If so minded, the Court approves the settlement, and notices are published of a period within which class members may opt-out of the arrangement and open to litigate separately. Distribution of the settlement funds will usually be by the representative claimant foundation. Since 2005, six major class cases have been settled under this model.³⁰

Conclusion

Voluntary arrangements will almost always be fastest in achieving payment of compensation, but sometimes external assistance is required with the core issues of liability, identification of all class members, quantification of individual or total entitlements, or distribution of a fund. Independent assistance (loosely called ADR) can clearly assist, and the existence of standing arrangements for complex competition cases may be beneficial. External incentives or compulsions, from regulators or litigation, may also assist. But the achievement of voluntary or agreed solutions will depend on what incentives or compulsions may be necessary.

C. OPTION 2: PUBLIC AUTHORITY FACILITATION OF COMPENSATION

A new option that will be available in future will involve the public enforcement authority in ensuring that compensation is paid. Hitherto, the public authority has only imposed public sanctions on firms, usually fines, and has not taken positive steps to incentivise firms to compensate or ensure that compensation is paid. But in the future system the CMA would have some form of discretionary power to achieve compensation within its arsenal of enforcement powers. This is a major innovation in competition cases in the U.K.

‘6.27 ... the Government recognises that there are some situations where it may be appropriate for the public enforcement body to consider mechanisms for redress, as part of its administrative settlement of cases. For example, in its case against certain independent schools, the OFT decided to impose a fine on the schools found to be price-fixing but also agreed that they would establish a series of trust funds to benefit the pupils who attended the schools during the academic years in which the infringement took place^{31 32}.’

The Consultation notes³³ that a number of stakeholders, including the CBI³⁴, have publicly advocated an approach along these lines. The proposal in the Consultation for the addition of a

³⁰ DR Hensler, ‘The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding’ (2011) 79(2) *The George Washington Law Review* 306. The procedure was first created for a product liability case (DES) but has since been used for cases by investors or policy holders (Dexia, Vie d’Or, Shell Petroleum, Vedior and Converium). A number of cartel cases are ongoing in Dutch courts, so WCAM may be invoked for them.

³¹ See OFT press release 166/06, 23 November 2006.

³² It should be noted that this was a settlement in lieu of a higher fine being imposed; it was not a settlement that would have protected the school against subsequent private actions.

³³ Consultation, para 6.28.

regulatory power was supported by consumer representatives,³⁵ business representatives,³⁶ lawyers,³⁷ some academics³⁸ and OFT.³⁹

How can compensation be facilitated or achieved by the actions of a public authority? There has been some confusion over exactly what is proposed, largely because several different options exist, not all of which have been fully elaborated or understood. The following are the main possible powers:

1. to remove illicit profits;
2. to order redress to be paid, identifying exactly how much is to be paid to every possible claimant;
3. to bring a collective action on behalf of claimants: this would probably be an opt-out arrangement, but could theoretically be an opt-in arrangement;
4. to bring public enforcement proceedings, on which private claimants could ‘piggy-back’ as civil parties to claim compensation;
5. to refer assessment of loss to the court;
6. to order an infringer to create a restoration scheme, without specifying the detail of which individuals are to be paid how much, and without further scrutiny;
7. to order the infringer to propose a compensation scheme that would be approved by the CMA and/or by the court, or by some independent (e.g. ADR) body;
8. to approve a compensation scheme that would be proposed either voluntarily by the infringer(s) or by infringer(s) and some or all claimants;
9. to refer a proposed compensation scheme to a court for approval;
10. to order an infringer to negotiate with claimant(s) and/or to refer a dispute to independent ADR, such as an ombudsman;
11. to take into account, in settling sanctions, payment of compensation made by a firm: this power might apply to public authorities or courts;
12. to have an enforcement policy that includes the goal of achieving restoration, as well as deterrence or other goals.

It will be seen that there are in fact many options for a regulatory power. Further, none of these options need stand alone. Indeed, the effectiveness of the technique is enhanced where several of the powers listed above are combined—whether with each other or with other options such as ADR techniques. Before examining the above powers in greater detail, it is interesting to see which of them have been considered, proposed or rejected in the U.K. discussions.

³⁴

At [http://www.cbi.org.uk/ndbs/positiondoc.nsf/1f08ec61711f29768025672a0055f7a8/295D209489C426DF802573370057C25E/\\$file/oftprivateactionsresponse260607.pdf](http://www.cbi.org.uk/ndbs/positiondoc.nsf/1f08ec61711f29768025672a0055f7a8/295D209489C426DF802573370057C25E/$file/oftprivateactionsresponse260607.pdf)

³⁵ Responses by Which?, Citizens Advice

³⁶ Responses by CBI, BDI, ILR.

³⁷ Responses by CLLS (para), CMS Cameron McKenna.

³⁸ Responses by Mulheron and Smith, Hodges, UEA. See earlier C Hodges *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart Publishing, 2008). UEA said: ‘It may be worth empowering NCAs to include agreements on damages in any settlement procedure. This would be a better, more cost effective, alternative to running the case again as a follow-on litigation. ... ‘Pure follow-on cases would add nothing positive to deterrence but mean duplication of enforcement efforts.’

³⁹ Response by OFT.

Limited scope and lack of clarity in the U.K. proposals

It is clear that the U.K. government is minded to introduce a regulatory power to facilitate the payment of compensation, but it is not clear exactly which of the possible powers are being proposed. The debate on this issue has not been extensive, and only a limited range of possible powers has been considered. The Consultation said:

‘6.34 The Government is proposing that the competition authority would be given an additional power to oblige businesses to take steps to make redress to those that had suffered loss due to their anti-competitive behaviour. This power could be used to benefit either consumers or businesses, though it is expected that the majority of cases in which such a power could appropriately be used would primarily benefit consumers.

6.35 Though not a sanction, the power would only be exercisable on a business that had been previously been found guilty of an infringement of competition law. Furthermore, it is proposed that the public authority would be able to certify the voluntary entry by an undertaking (again, one that had previously been found to have infringed competition law) into such a settlement scheme. ...

6.37 The OFT would have a discretion whether or not to seek compensation for victims of the infringement, rather than a duty, based on factors such as the suitability of the case and the resources that would be required from the OFT, bearing in mind the need to prioritise its resources effectively across all areas of activity. A decision to impose a redress scheme would be appealable to the CAT by the subject of the decision; however, it is not considered that a decision not to impose a scheme, or a decision to refuse to certify a voluntary scheme, should be appealable.

6.38 Such a power could have a similar effect to the FSA’s ability under Section 404F(7) of the Financial Services and Markets Act (FSMA) to impose, on a single firm, a scheme which ‘corresponds to or is similar to a consumer redress scheme’

6.39 Four key aspects of the FSA’s power that the Government considers might be worth including in a new power for the OFT are:

- Use of the power would be entirely independent of any fines or other sanctions that may be imposed.
- The OFT would not attempt itself to quantify individual loss. Rather it would set out the types of redress that could be awarded and direction as to how redress should be calculated, but would leave it for the firm to apply these rules to calculate loss on an individual case basis.
- A redress scheme could either be imposed by the OFT or entered into on a voluntary basis by the undertaking and certified by the OFT. No consultation would be necessary.
- Although any consumers who make use of the redress scheme give up their right to sue (it is essentially a form of settlement), there is no curtailment of the rights of consumers to take action through the courts if they do not believe the scheme to be satisfactory. This would be an important check as it ensures that the scheme must provide genuine restitution for the wrong done.’

Thus, different paragraphs in the Consultation seemingly refer to different powers. The following paragraphs appear to refer to the following seven powers identified above:

Consultation Paragraph	Power Number
6.34	2, 4 or 6
6.35	8
6.38	or 1
6.39, second bullet	Excludes 1
6.39, third bullet	1 or 6, and 8

So, the Consultation has a certain lack of clarity, but it is in fact an important function of the Consultation to seek views on the various options. The Government makes clear that a great deal may depend on the precise wording as well as the nature of the power(s) that are granted:

‘6.32 The Government believes that the proposals will have to be carefully formulated to ensure that the decision to impose (or not impose) redress schemes is genuinely discretionary for the OFT and does not lead to undue legal challenges and the associated resource burdens. We do not believe, for instance, that infringers should have the right to appeal either a redress scheme imposed by the OFT or an OFT decision not to approve their voluntary redress scheme.’⁴⁰

The OFT is firmly against powers 2, 6 and 7, but accepts power 8 as long as it operates on a ‘high level basis’.⁴¹ Its approach is based on declining to get involved in any aspect of quantifying individual loss, and in overseeing the satisfactory implementation of any payment scheme,⁴² and that the authority should only approve proposals put forward voluntarily by firms in general terms.⁴³

It argues that to adopt ‘a compulsory power may take up considerable time and resources in ensuring that potentially unwilling businesses implement a redress scheme in an appropriate manner’ and take significant resources away from the [authority’s] core enforcement work’⁴⁴ and that ‘If BIS were to maintain the proposal for the OFT to require undertakings to set up redress schemes, the OFT would require substantial additional resources to perform this role.’⁴⁵

The Consultation also anticipated this position:

⁴⁰ Consultation. See also OFT Response, para 4.7.

⁴¹ OFT Response, paras 1.14, 1.1.5, 4.3 to 4.7.

⁴² Ibid, para 4.4 states: ‘The OFT considers that such a mandatory power would be best exercised by a court, with appropriate sanctions available to those who did not comply with the court’s order. Otherwise the devotion of resources by the OFT to the use of this compulsory power may be at the cost of the OFT’s other functions. If BIS were to maintain its proposed mandatory power for the OFT to require undertakings to set up redress schemes, the OFT considers that it would require substantial additional resources to perform this role.’ As Mulheron and Smith suggest, implementation could be overseen by a power to require the infringer to put in place an independent monitoring trustee.

⁴³ In contrast, the Response of Mulheron and Smith favours a power to require firms to offer a redress scheme in any event, but not for the authority to require or even permit the OFT to certify voluntary redress schemes. They also suggest that if the authority does approve a scheme, individuals could object to a court without involving the authority.

⁴⁴ Ibid, para 1.14

⁴⁵ Ibid, para 1.15.

‘6.29 ... the Government also considers it important that any new role does not detract from the OFT’s existing role of detecting, examining and sanctioning anticompetitive activity. ...

6.31 ... the Government would not wish the OFT to become so involved in the business of quantifying the degree of loss suffered by consumers or business that this led to an impairment in carrying out its other functions. To divert resources away from or delay enforcement activities in order to help facilitate compensation could cause a reduction in deterrence and therefore an increase in anticompetitive behaviour.’⁴⁶

The OFT also argued that ‘The redress scheme should also be independent of any other fines or sanctions that may be imposed for a breach of competition law, although as set out below we do not rule out penalty reductions in individual cases.’⁴⁷ In contrast with the German approach, it appears that the British approach would maintain imposing a public fine first, possibly irrespective of whether or not compensation is agreed or paid. The potential for inconsistencies between defendants in different jurisdictions is apparent: some may pay more than others overall.

It should be noted that the OFT is sensitive to criticism that its general enforcement record is poor when compared with authorities in other Member States, as noted by the Government itself in Table 1 (para 21) of its Consultation:

Table 1. Aggregate figures on antitrust cases for selected member states 1 May 2004 – 1 September 2010

Member State	New case investigations	Decisions notified to the European Commission
France	189	70
Germany	128	58
Italy	81	58
Netherlands	76	32
Denmark	62	32
Spain	75	30
Greece	31	22
Hungary	79	20
Sweden	36	16
Slovenia	24	12
UK	52	11
European Commission	195	N/A

However, as noted below, it may be that the way in which compensation oversight powers can work (and do work for other authorities) has not been fully understood. They enable some authorities to achieve more swift overall negotiated solutions to both public and private enforcement aspects, shortening total enforcement duration of some cases, and thereby facilitating larger throughput of cases.

In contrast to the official position, both Citizens Advice and Which? called for the authorities to have the power to require businesses to compensate affected consumers as part of the standard

⁴⁶ Consultation.

⁴⁷ OFT Response, para 4.5.

enforcement process. Citizens Advice favoured the power 3 public opt-out collective action in all consumer protection legislation. Which? thought that if the OFT does not have ‘a stick’ through which it can encourage a voluntary redress mechanism, its ability to obtain adequate redress could be severely limited. Which? were also concerned about creating an ‘enforcement bottleneck’, although Citizens Advice said:

‘We do not agree with the concern expressed in the consultation that facilitating redress through regulators might divert the regulator from their enforcement work. We believe that this will increase the effectiveness of enforcement because it:

- provides a level playing field for businesses that do follow the rules
- removes the financial gains made from illegal practices
- alerts consumers to the bad practice by requiring the business to provide the redress
- provides the business being punished with an opportunity to recognise their bad practice and to apologise to their customers along with the redress.’

Analysis of Types of Regulatory Power for Achieving Compensation

The range of individual powers will now be considered in greater detail. It will be seen that some powers are already used by competition regulators in other leading jurisdictions or by British regulators in other sectors, seemingly with success.

Power 1 (removing illicit profits) is widely used in U.S.A. and has been introduced in Germany relatively recently, and is a duty for many regulators in U.K.. The arrangement in the United States was summarized thus:⁴⁸

‘The public enforcer can be an effective means to provide compensation. The “Fair Funds” mechanism of the Securities and Exchange Commission (the “SEC”) demonstrates one possible approach to meeting the dual goals of public enforcement and private compensation. Each year, the SEC collects substantial civil penalties and disgorgement amounts⁴⁹ from securities law violators. In 2010 and 2011, the SEC ordered recoveries of \$2.8 billion per year.⁵⁰ Since 2002, the SEC has been able to place these recoveries into Fair Funds, which it can choose to distribute to investors harmed by the punished conduct.⁵¹ The SEC administers and distributes these funds pursuant to plans that must be approved either by a court or by the SEC after a period for public comment. The amount of money that the SEC has transferred to date has been significant, between 2002 and 2010, 128 Fair Funds were created, and \$6.9 billion was returned to investors.⁵²

⁴⁸ In the Response by the U.S. Chamber of Commerce’s Institute for Legal Reform.

⁴⁹ The SEC’s power to require companies to disgorge ill-gotten gains is analogous to the skimming authority in European countries.

⁵⁰ See Government Accountability Office (GAO), SEC’s Financial Statements for Fiscal Years 2011 and 2010, GAO-12-219, at 57 (15 November 2011).

⁵¹ Sarbanes-Oxley Act, Pub. L. No. 107-204, § 308(a), 116 Stat. 745 (codified at 15 U.S.C. § 7246(a)).

⁵² See GAO, SEC Fair Fund Collections and Distributions, GAO-10-448R, at 31 (22 April 2010).

In German competition cases, the Federal Cartel Authority (BKA) may since 2005⁵³ order the ‘skimming off of the economic benefit and require the undertaking to pay a corresponding sum of money’, which will be paid to Federal funds, except where the economic benefit has been skimmed off by the payment of damages, or the imposition of a fine, or an order of forfeiture.⁵⁴ The same skimming off power was recently granted to trade associations⁵⁵ although extension to consumer associations remains controversial. A reimbursement mechanism protects defendants against multiple claims: sums that have already been collected in order to skim off any economic benefit are repaid in the event that compensation for damages is paid subsequently.

The rationale for the extension of the power to certain private sector bodies was that a great deal of unfair trading law is enforced by them in Germany (unlike many other Member States) through their powers to bring injunctions for breaches of the Unfair Competition Law (UWG), so this was a natural extension.⁵⁶ Any sums skimmed off by the private bodies is paid to the federal budget.

It will be seen that the payment of illicit profits to the Federal budget and the prohibition of skimming off, or equalisation where damages are paid subsequently, maintain the purity of the sanctioning system, in that it is solely the BKA as public authority that fixes the amount of the fine or other penalty. This has two results. Firstly, the level of deterrence can be decided upon and maintained irrespective of whether damages are or are not paid. Secondly, damages should be paid in any event, as a result of action taken by either the public authority or approved private bodies, in circumstances where the latter are highly likely to be involved in any B2B and probably C2B issues. Thus, the public authority has the relevant powers for both sanctioning and skimming off, and is in prime position to achieve these ends. If private actors claim for damages, they may do so, through a civil procedure system that is notably swifter and cheaper than most common law systems.⁵⁷

Various general powers are available to U.K. criminal prosecutors under the Proceeds of Crime Act 2002. Where a person has been convicted of an offence in the Crown Court, and the court decides that the defendant has benefited either from the particular criminal conduct, or from his conduct in a general criminal lifestyle, it must make a Confiscation Order for a ‘recoverable amount’, being the defendant’s benefit from the conduct.⁵⁸ The authority may also apply for a Recovery Order for property, transferring it to the Trustee for Civil Recovery,⁵⁹ or a Forfeiture Order for cash.⁶⁰ Notably, it may also commence civil proceedings in the High Court by an

⁵³ German Act Against Restraints on Competition (GWB), art 34.

⁵⁴ See Wolfgang Wurmnest, ‘A New Area for Private Antitrust Litigation in Germany? A Critical Appraisal of the Modernized Law Against Restraints of Competition’ (2005) 6 German Law Journal 1173; Thomas Lübbig and Miriam Le Bell, ‘Die Reform des Zivilprozesses in Kartellsachen’ (2006) Wettbewerb in Recht und Praxis 1209. see also S Peyer, ‘Myths and Untold Stories – Private Antitrust Enforcement in Germany’, University of East Anglia, Centre for Public Policy, Working Paper 10-12, July 2010, at <http://ssrn.com/abstract=1672695>

⁵⁵ GWB, art 34a.

⁵⁶ The Response by the German employers’ association BDI argued ‘In the context of such wide-ranging powers of public and private parties, a need for further collective redress mechanisms in competition law is to be doubted.’

⁵⁷ C Hodges, S Vogenauer and M Tulibacka, *The Costs and Funding of Civil Litigation. A Comparative Perspective* (Hart Publishing, 2010).

⁵⁸ Proceeds of Crime Act 2002, ss 6-13.

⁵⁹ *Ibid*, s 266.

⁶⁰ *Ibid*, s 298(2) for cash seized under s 295.

enforcement authority for a Recovery Order for recovery of property that is obtained through unlawful criminal conduct.⁶¹

In relation to financial services, the Financial Services Authority (FSA) has a specific ‘skimming off’ power to seek a compensation order from the court, for such sum as appears just, where profits have accrued to a person as part of a contravention of the requirements and a person has suffered loss as a result, and seize infringers’ assets.⁶² Similarly, the FSA has power to impose a penalty on an individual ‘for such amount as seems just’,⁶³ and this has been used to equate to ‘disgorgement’ of the profits of insider dealing.⁶⁴

Power 2, an order to pay redress specifying exactly what is to be done, applies where the authority has information that satisfies the identification and quantum issues. It may be tempting to overlook this power on a comparative analysis, but that would be a mistake. There may be circumstances in which the power might save resources and time. Examples might include where there is a recalcitrant infringer, or in conjunction with the voluntary approval power (power 7), perhaps in relation to making the infringer subject to a binding obligation of distribution, that could then be subsequently enforced by either public or private action.

The power might also apply where compensation is not to be paid to individuals, but another approach to sanctioning is adopted. An example of this power is the *UK Independent Schools* case, where the OFT agreed that the 50 infringing schools should not pay a fine but instead make *ex gratia* payments totaling £3 million to create an educational trust.⁶⁵

Since 2010, the FSA’s enforcement policy has adopted ‘restorative justice’ principles: it prioritises disgorgement (restitution), discipline (penalties for offenders), mitigating or aggravating circumstances, deterrence and settlement discount, in that order.⁶⁶ The FSA has power to ‘make rules for the purpose of securing that redress is paid’ where there has been ‘widespread or regular failure by firms to comply with the requirements, as a result of which

⁶¹ Ibid, s 240-243. An example of this was where the purveyor of an unlicensed medicine that had been illegally marketed (as ‘Flabjab’) with a claim that it would lead to slimming was fined £5,000 in a criminal prosecution by MHRA. MHRA then brought a civil application under s 243 of the Proceeds of Crime Act 2002, and obtained a court order for disgorgement of £800,000 profits.

See <http://www.mhra.gov.uk/PrintPreview/PressReleaseSP/CON043922>, 8 April 2009.

⁶² Financial Services and Markets Act 2000 (FSMA), ss 382 and 383. The Australian Competition and Consumer Commission has similar powers: see <http://www.accc.gov.au/content/index.phtml/itemId/142>.

⁶³ FSMA, s 66.

⁶⁴ Amongst a series of cases, see FSA Final Notice to Anjam Saeed Ahmad, 22 June 2010, which represented disgorgement of £131,000. In sentencing Mr Ahmad to 10 months imprisonment suspended for 2 years, 300 hours of unpaid work and a fine of £50,000, the judge said ‘It is only because of the quite exceptional mitigating factors such as the swift and timely admissions to the FSA and other matters such as the SOCPA [disgorgement] agreement that saves you from immediate imprisonment’: FSA press release, 22 June 2010.

⁶⁵ *Exchange of Information on Future Fees by Certain Independent, Fee-Paying Schools* (OFT, 20065). See *Evaluation of an OFT intervention. Independent fee-paying schools* (OFT, May 2012), OFT1416; and A Ezrachi and M Ioannidou, ‘Public Compensation as a Complementary Mechanism to Damages Actions: from Policy Justifications to Formal Implementation’ [2012] *Journal of European Competition Law & Practice* ..

⁶⁶ FSA policy paper PS10/4: Enforcement financial penalties - feedback on CP09/19; 26 February 2010, this Policy Statement PS10/4 reports on the main issues arising from Consultation Paper 09/19 and publishes final rules. http://www.fsa.gov.uk/pages/Library/Policy/Policy/2010/10_04.shtml.

consumers have suffered loss or damage for which they would have a private right of action.⁶⁷ The rules may require a firm to establish and operate a consumer redress scheme, under which the firm must investigate whether it has failed to comply and that has caused loss, and if so determine what the redress should be, and then make that redress.⁶⁸

The essential purpose of this provision is not that it will be put into action, but that it can be invoked as a ‘big stick’ in the shadow of which the FSA may make less formal requests of firms to act semi-autonomously in making redress. This power is one of an armoury of powers that are invoked in enforcement and negotiation. An integral part of the dispute resolution structure is the Financial Ombudsman Service, which will apply directions made by the FSA in resolving consumer complaints against firms.⁶⁹

The FSA issued consultation on imposing a redress scheme in 2012,⁷⁰ and has used a power to impose conditions equivalent to a consumer redress scheme, linked to a firm’s permission, on several occasions.⁷¹ The latter power is a negotiated approved and supervised redress scheme, which can be likened to a plea bargain or a leniency application.

Power 3 operates in Denmark, where it is notably efficient and effective. The Danish Consumer Ombudsman,⁷² who is the principal enforcement authority for consumer law,⁷³ has been authorized to institute a compensation class action on behalf of consumers since 1 January 2008,⁷⁴ and in relation to competition law since 1 October 2010.⁷⁵ Whilst private parties have the right to proceed under an opt-in class action, only the Consumer Ombudsman has power to

⁶⁷ Financial Services and Markets Act 2000, s 404, inserted by Financial Services Act 2010, ss 14 and 26(3) and SI 2010/2480.

⁶⁸ Ibid, s 404 (1)(3).

⁶⁹ See the cases at www.fsa.gov.uk/library/policy/guidance/2011/s404f.shtml. C Hodges, I Benöhr and N Creutzfeldt-Banda, *Consumer ADR in Europe* (Hart Publishing, 2012).

⁷⁰ *Consumer redress scheme in respect of unsuitable advice to invest in Arch cru funds* (FSA, April 2012). The proposed scheme was estimated to deliver £100 million in redress to between 15,000 and 20,000 consumers.

⁷¹ FSMA, s 404(f)(7). Arrangements have been Bank of Scotland re Halifax tracker mortgages, Welcome Financial Services Limited, and three arrangements (Capita Financial Management Limited, HSBC Bank plc, and BNY Mellon Trust & Depositary (UK) Limited) linked to investments in Arch Cru.

See www.fsa.gov.uk/library/policy/guidance/2011/s404f.shtml.

⁷² The Consumer Ombudsman was created in 1975 under the Marketing Practices Act. He does not operate as an ombudsman in the sense that that term is understood in most jurisdictions, involving just dispute resolution, but is principally an enforcer of consumer law. His office is administratively part of the Competition and Consumer Authority, and he has a wide ranging jurisdiction and range of powers. See <http://www.consumerombudsman.dk>

⁷³ The Consumer Ombudsman may initiate criminal prosecutions for breaches of the Marketing Practices Act and other consumer law provisions, but all prosecutions have to be approved by the public prosecutor. The Consumer Ombudsman handles some prosecutions in-house and outsources some to the police or a government-related law firm. Hence, the Consumer Ombudsman is in the unique situation within Denmark of being able to initiate both criminal and civil cases.

⁷⁴ Act No 181 of 28 February 2007(the Class Actions Act). See E Werlauff, Denmark Country Report at <http://www.law.stanford.edu/library/globalclassaction/index.html>; also H Aagaard and J Røn, ‘New rules on class actions under Danish law’ note on file with the author, 2007.

⁷⁵ Danish Act on Competition, s 26. Prosecutions for breaches of competition law are usually instituted by the police (the State Prosecutor for Serious Economic Crime), on referral by the Director General of the Competition and Consumer Authority after formal decisions on violations by the Competition Council.

request the court to designate a class action as an opt-out procedure.⁷⁶ Almost all consumer claims are handled by the Consumer ADR system and individual court proceedings are rare. There has only been one completed private class action (in which there was held to be an infringement but no damage).⁷⁷ A few more are pending, but the advantages of investigatory powers, the persuasive influence of enforcement powers and the fact that the Consumer Ombudsman is state funded means that few private actions would ever be anticipated.

In contrast, the Consumer Ombudsman is in a unique position to deal at the same time with enforcement of regulatory compliance and compensation issues, because he has powers covering both sides.⁷⁸ His primary role is enforcement of the law through pursuing convictions in courts, but he is able to conclude many cases by negotiation and agreement with companies, and this ability enables him to deal with compensation and restoration of market balance through payment of compensation as part of the public sanctioning process.

The Consumer Ombudsman sees his power to initiate a class action for compensation as a major element in his armoury of enforcement tools, from which he can select in negotiations depending on the particular circumstances. He regards the unique opt-out class action power as an important potential threat ('a nuclear weapon'), which he has not used since 2008 and would only expect to have to use rarely, but has found to be highly persuasive in negotiations. The result of having a full armoury of public and private enforcement weapons is that many cases are concluded by agreement, even if some are agreed only at the court door, and his throughput of enforcement cases is high, and low cost. He can avoid lengthy court cases where responsible businesses are concerned, in part relying in the power of a need to maximize market reputation for large companies with strong brands, which is leveraged as a negotiating tool in enforcement action, on the basis that such firms prefer to announce that they have identified a problem and will voluntarily pay compensation, rather than be seen to fight the Consumer Ombudsman through the courts. Enforcement takes the form of a negotiation over the company's plans for redress, followed by imposition of a sanction, acceptance by the company (with the fall-back right to argue about it in court if appropriate), and avoidance of lengthy investigations over whether an infringement has taken place and can be proved. The enforcer is therefore able to concentrate enforcement firepower on rogues.⁷⁹

⁷⁶ The following is taken from C Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart Publishing, 2008), p 27ff: The court must approve a case as suitable for examination according to the rules on class actions. The principal rule is that individual claimants must opt in to an approved class action procedure. But the court may approve an opt-out model if an opt-in approach is not appropriate in the circumstances. The approval rules contain two conditions which were inserted specifically to emphasise that opt out class actions are of an exceptional nature. First, the case must concern claims that are so small that it is evident that they cannot generally be expected to be brought through individual actions. Such claims will normally involve under DKK 2,000. Secondly, a class action under the opt-in model must be deemed to be an inappropriate method of examining the claims. This will be the case if the class includes a very large number of persons so that the practical administration of opt in notices will require a disproportionate amount of resources. On the opt-in model, court may appoint a class representative. On the opt-out model, only public authorities (i.e. the Consumer Ombudsman) may be appointed as class representatives.

⁷⁷ The Bank Trelleborg case, decided by the Supreme Court in 2012.

⁷⁸ This is similar to the position in other Nordic states. Finland does not allow any private class actions, only permitting the Consumer Ombudsman to use the class action compensation power.

⁷⁹ The Consumer Ombudsman has requested the government to change the law so as to allow him to institute a compensation claim in an individual case, on the basis that that would add to his armoury through the ability to take action without having to wait for at least two cases to be established, as at present.

The Consumer Ombudsman is subject to the normal ‘loser pays’ rule on court costs, so is careful how many cases he takes on. He considers that the outcome on some banking cases is inherently uncertain, but that some have to be decided by a court for reasons of clarifying the law and maintaining public confidence in the banking and regulatory systems.

What has happened under this regime is that responsible companies, provided they have the right incentives, come to the enforcer to own up and seek approval of plans for restitution (damages) and to earn a reduced sanction. This radically increases compliance, assists identification of infringements, and short-circuits the enforcement process.

Power 4 (criminal prosecution with compensation piggy-back) exists under the criminal law of virtually every European state, and is widely used by private claimants in civil law jurisdictions across Europe. Where a prosecutor commences a criminal investigation, private parties may join the procedure as ‘civil parties’. If a defendant is convicted, the civil party will be awarded compensation by the same court.⁸⁰ Many compensation cases are dealt with under this model in Continental Europe.

In the U.K., the power was noted above for any criminal court to make a compensation order in criminal proceedings in favour of private parties,⁸¹ and, more recently, for an enforcement authority to bring civil (non-criminal) proceedings for recovery of any property obtained through unlawful conduct.⁸²

Power 5 (refer assessment of compensation to the court) has been included in this list since the OFT stated, in the context of private actions: ‘we consider that civil courts, who assess damages claims daily, are better placed than the OFT to carry out assessments of the quantum of harm caused by infringements.’ It may theoretically be possible to envisage a referral of a case to court for assessment of compensation after a finding of infringement by the public authority, but it is difficult to envisage in practice who or how representation and cost are to be ensured if the authority does not wish to take part in the compensation proceedings (as the OFT do not).

Powers 6 and 7, ordering an infringer to create or operate a scheme, or to propose one, is similar to imposing a scheme (power 2). The precise formulation may be preferable in particular circumstances. There may be little difference in practice between them in some situations, and some examples have already been referred to under power 2 above. In particular, there is the FSA’s consumer redress scheme power.⁸³ This power must be seen as part of a wider armoury of requirements that constitute a regime requiring firms to carry out collective redress themselves. There are four key aspects:

1. an obligation on firms to carry out proactive reviews of their complaints and sales;⁸⁴

⁸⁰ A comparative review of this technique and of cases is forthcoming from S Voet of Ghent University.

⁸¹ Powers of Criminal Courts (Sentencing) Act 2000, s 130.

⁸² Proceeds of Crime Act 2002, s 240.

⁸³ FSMA, s 404(F).

⁸⁴ This was first introduced in guidance DISP 1.3.5G in November 2007, which left it to firms to decide when proactive redress would be appropriate. Consultation paper CP11/10 introduced new guidance from September 2011, under which firms are expected to carry out proactive customer contact exercises in most cases where a systemic problem is identified.

2. a requirement that in doing so they take account of decisions of the FOS;⁸⁵
3. a requirement on firms to provide the FSA with complaints handling data;⁸⁶
4. a requirement for a firm to appoint an 'approved person' individual with official responsibility for oversight of the firm's compliance with complaints handling rules.⁸⁷

Other public bodies have or are gaining powers to facilitate redress, including Ofcom,⁸⁸ and Ofgem.⁸⁹ Many more bodies include restorative justice within their formal policies, as required by legislation,⁹⁰ such as The Office of Rail Regulation (ORR),⁹¹ The Civil Aviation Authority⁹² and The Environment Agency.⁹³

Power 9 (approval of settlement by court) was favoured over **power 8** (approval by OFT) by Consumer Focus.⁹⁴ In arguing that all early settlements should be judicially approved, it cited the npower case, saying that the energy group had been made by the regulator Ofgem to repay an average of £6 each to 200,000 customers, but had later agreed to calculate each overpayment made by the affected customers and repay a total of £63 million plus VAT as a result of pressure from Consumer Focus and the Sunday Times newspaper. However, it may be although that the lesson from this case is the need for transparency and oversight, this does not necessarily require judicial oversight. Other forms of oversight exist, such as public transparency, consultation

⁸⁵ FSMA s 225 states that the purpose of the FOS is to provide a scheme under which certain disputes may be resolved 'quickly and with minimum formality'. CP11/10 makes FOS' decisions binding precedents, and FSA expects firms to take account also of FOS' published online decisions, as well as decisions that they receive directly: by November 2010, published contents covered more than 90 per cent of FOS' caseload, enhancing predictability.

⁸⁶ CP11/10.

⁸⁷ DISP 1.3.7R, applicable from September 2011.

⁸⁸ Under the Communications Act (2003) <http://www.legislation.gov.uk/ukpga/2003/21/section/94>

⁸⁹ See the shift to a restorative approach in *Consultation on a proposed new power for Ofgem to compel regulated energy businesses to provide redress to consumers* (12D/060: DECC, April 2012), available at <http://www.decc.gov.uk/assets/decc/11/consultation/4975-consultation-on-a-proposed-new-power-for-ofgem-to-.pdf>

⁹⁰ Regulatory Enforcement and Sanctions Act 2007

⁹¹ A consultation issued in 2012 proposes a policy of accepting 'reparations' to encourage rail operators to spend money within the industry to 'make good' the harm brought about by a breach of licence instead of paying a financial penalty, which, having received widespread industry support, 'will incentivise operators to think about the impact problems have on their customers and could bring more immediate, tangible benefits than a financial penalty alone would'. See *Rail operator penalties to benefit customers, proposes regulator* (ORR, 14/05/2012), available at <http://www.rail-reg.gov.uk/server/show/ConWebDoc.10919>

⁹² *Civil Aviation Authority: Interim Consumer Enforcement Strategy* (CAA, September 2011), available at http://www.caa.co.uk/docs/2107/Interim_Consumer_Enforcement_Strategy.pdf: 'Wherever possible we will aim to ensure businesses provide redress to consumers who have been unable to access their rights due to non-compliance... We will consider whether publishing information about a specific business may be an effective sanction for changing the behaviour of a business or eliminating financial gain.'

⁹³ See the power to impose restorative remedies under the civil sanctions powers of The Environmental Civil Sanctions (England) Order 2010/1157 and The Environmental Civil Sanctions (Miscellaneous Amendments) (England) Order 2010/1159. The stated policy is: 'a non-compliance penalty will be based on the cost being avoided, in restoration of harm for example. This will ensure a proportionate penalty that will level the playing field for businesses who do comply with sanctions. It will also give priority to compliance and restoration ahead of taking monetary penalties The non-compliance penalty will not be payable if the original requirement is complied with in the time set for the penalty to be paid. The regulator will also have the flexibility to reduce the penalty to reflect part compliance. The provision avoids the likely rigidity and potential lack of proportionality of a daily fine which most responses to the consultation preferred.'

⁹⁴ <http://www.consumerfocus.org.uk/files/2009/06/Consumer-Focus-response-to-the-BIS-consultation-on-Private-Actions-in-Competition-Law.pdf>

mechanisms, and scrutiny by Parliamentary Ombudsman and Parliamentary committees, as well as judicial review of administrative action.

It might be thought that a power to order a firm to negotiate (**Power 10**), without any further requirement as to achieving a satisfactory outcome or involvement in the process, may be of little use. There may be situations in which parties need to be brought together, for example where there are many and they have difficulty in identifying everyone who should be involved. However, a power to refer a dispute to an ADR process that includes some binding outcome may be of wider relevance. An example exists in Italy, where a mechanism for telecoms complaints requires them to start through negotiation, followed by escalation to the telecoms regulator, who has power to award damages.⁹⁵

Power 11 (reduction in fine) already exists to a limited extent but if the incentives to propose and deliver compensation are to be made more effective, this power will need to be reviewed. Other regulators have used this power effectively, an example being regular reductions in fine by the U.K. telecommunications regulator Ofcom.⁹⁶

Ezrachi and Ioannidou have recorded various examples of where the Commission and some authorities have either reduced or even waived fines after firms have paid compensation:⁹⁷

- *Rover*: £1m donation to the consumers association for information services for car purchasers;
- *Interpay*: Dutch authority reduced fines after banks set up a €10m fund for an efficient payment system;
- *Stadwerke Uezelen*: German authority closed case where 29 gas suppliers refunded €27m to customers;
- *Nintendo, General Motors, and Pre-Insulated Pipe Cartel* cases: fines reduced after compensation;
- *Macron*: Commission closed file after Angus Fire made payment to Macron;
- *Sony/Philips Licensing Agreement*: new agreement negotiated and payment of royalties due.

Power 12 (restoration as a goal of enforcement policy) is being adopted by almost all U.K. regulatory authorities—apart from those responsible for competition law.

⁹⁵ Decision no. 173/07/CONS of the Public Authority for Telecommunication requires that there must be a mandatory attempt at settlement before local administrative bodies, or before the Chambers of Commerce, or through a conciliation body on which representatives of telecommunication companies and the consumers associations sit. If a settlement is not reached, any party can refer the case to be decided by the Public Authority for Telecommunication, which operates on an arbitration basis. Separate procedures for settlement of telecom disputes exist for mobile phones, which can be activated also through the internet, and for normal phones.

See http://www2.agcom.it/operatori/operatori_utenti.htm.

⁹⁶ For example, Ofcom, stated that the fine of £2,000,000 imposed on a company that breached various provisions of the Broadcasting Code and ITC Programme Code arising out of phone-in competitions would have been higher if the company had not taken a series of remedial steps, including the resignation of responsible officers, strengthening of compliance systems, and offering refunds to individuals in relation to a potential 25 million entries, plus making a £250,000 donation to a children's charity. See C Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart Publishing, 2008), pp 216-218.

⁹⁷ A Ezrachi and M Ioannidou, 'Public Compensation as a Complementary Mechanism to Damages Actions: from Policy Justifications to Formal Implementation' [2012] *Journal of European Competition Law & Practice* ..

One of the mandatory principles of criminal sentencing in U.K. that is binding on a criminal court sentencing any offender is to have regard to ‘the making of reparation by offenders to persons affected by their offences’.⁹⁸ For some years criminal courts have possessed a general power to order a person convicted of an offence to pay compensation for any personal injury, loss or damage resulting from that offence, or any other offence that is taken into consideration by the court in determining sentence.⁹⁹ From 2012, criminal courts have been *required* to consider making a compensation order in any relevant case after conviction.¹⁰⁰

The Government has reiterated the approach in its 2012 statement of general policy on criminal law, referring to the need for ‘A step-change in restorative justice’ and ‘An outcomes-based framework’ under which ‘Victims should receive help as and when they need it’ and ‘Offenders should make reparation for the impact of their crimes. We want to see a shift away from compensation funded by the taxpayer to a situation in which more offenders take personal responsibility for the harm they have caused by offering an apology or by making the appropriate financial or practical reparation.’¹⁰¹

Regulatory authorities’ roles have also widened to encompass restorative justice as well as traditional enforcement. Since 2007, many regulators (curiously excluding the competition enforcer) have been subject to a *requirement*¹⁰² to aim to eliminate any financial gain or benefit from non-compliance as an integral part of their enforcement role.¹⁰³ Almost all regulators were enabled to exercise a new category of civil sanctions, including imposing discretionary requirements that the offender must take steps specified by the regulator, within a stated period, designed to secure (a) that the offence does not continue to recur (a ‘compliance requirement’) and (b) that the position is restored, so far as possible, to what it would have been if no offence had been committed (a ‘restoration requirement’).¹⁰⁴ If a person refuses to comply with a discretionary requirement or undertaking, the enforcer may decide to bring a prosecution for the

⁹⁸ Criminal Justice Act 2003, s 142, Purpose (e).

⁹⁹ Powers of Criminal Courts (Sentencing) Act 2000, s 130, traceable back to the Powers of Criminal Courts Act 1973. A compensation order made by a magistrates’ court is capped at £5,000: *ibid*, s 131 (1). Crown Courts are not so capped.

¹⁰⁰ The Legal Aid, Sentencing and Punishment of Offenders Act 2012, s 63, inserting subsection (2A) into s 130 of the Powers of Criminal Courts (Sentencing) Act 2000.

¹⁰¹ *Getting it right for victims and witnesses*, Consultation Paper CP3/2012, Ministry of Justice, January 2012, at <https://consult.justice.gov.uk/digital-communications/victims-witnesses>. The policy was confirmed in *Getting it right for victims and witnesses*, the Government response Cm 8397, Ministry of Justice, July 2012, at <http://www.official-documents.gov.uk/document/cm83/8397/8397.pdf>. See also *Swift and Sure Justice: The Government’s Plans for Reform of the Criminal Justice System* Cm.838: Ministry of Justice, July 2012), available at <http://www.justice.gov.uk/downloads/publications/policy/moj/swift-and-sure-justice.pdf>

¹⁰² Any business that believes that a regulator is failing to have regard to the Code will be able to seek redress by complaining to the relevant regulator or the Parliamentary Ombudsman. It may also be possible to apply for judicial review of the regulator’s actions.

¹⁰³ *Regulators’ Compliance Code: Statutory Code of Practice for Regulators*, (BERR, 17 December 2007), at <http://www.berr.gov.uk/files/file45019.pdf>, para 8.3. The Code is made under the Legislative and Regulatory Reform Act 2007, s 22.

¹⁰⁴ Regulatory Enforcement and Sanctions Act 2008, s 42. See *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act* (Department for Business Enterprise and Regulatory Reform, July 2008) at <http://www.berr.gov.uk/file47135.pdf>.

original offence.¹⁰⁵ The same regulatory bodies¹⁰⁶ are also subject to a duty to observe the ‘principles of good regulation’ (the Hampton principles), including transparency, accountability, proportionality, consistency, targeting only at cases where action is needed.¹⁰⁷ The Government has strongly supported the ‘regulatory oversight of compensation’ approach in its 2009 framework legal system policy on collective redress.¹⁰⁸

In contrast to these policies, it is notable that the competition authorities’ enforcement policies fail to mention restoration as a goal of the public authority.

Conclusions on the regulatory options

The above analysis shows that a range of possible powers can be contemplated to facilitate compensation, and many exist and are operated with success by public bodies. The technique can work, and work well if properly designed. Indeed, there is a clear trend towards the inclusion of restorative justice in the roles and duties of public enforcement authorities.

The implementation of a public restorative power, or powers, affords a considerable opportunity to deliver compensation and other redress. But the choice of powers and their precise formulation will be crucial to the ability to gain the considerable benefits that can be realized. As the Government notes:

‘6.41 Such an approach might lead to a more efficient and effective way for consumers and businesses to obtain compensation and reduce the burden on the courts than proceeding with a court case.’

It is instructive to consider in which type of cases a regulatory power would be used. The Consultation states:

‘6.36 Some cases would be much more appropriate for the use of such a power than others: in particular, this procedure would likely be most appropriate for cartel cases involving large numbers of undifferentiated products bought by many consumers, such as milk or football shirts. As it happens, these are cases where there is often most consumer detriment in aggregate, and where bringing cases before the UK courts can be most difficult.’

Mulheron and Smith agree that power 5 would apply

‘typically in those cases where a cartel has substantially affected individual end-consumers (such as the alleged cartel in the dairy sector in the UK—allegations which were later dropped by the OFT, per: *Press Release 46/10*, ‘OFT drops a number of

¹⁰⁵ *Regulatory Enforcement and Sanctions Act 2008: Guidance to the Act* (Department for Business Enterprise and Regulatory Reform, July 2008), para 50.

¹⁰⁶ See The Legislative and Regulatory Reform (Regulatory Functions) Order 2007, SI 2007/3544.

¹⁰⁷ Legislative and Regulatory Reform Act 2007, s 21.

¹⁰⁸ UK Government’s Response to the Civil Justice Council’s Report: ‘Improving Access to Justice through Collective Actions’, Ministry of Justice, July 2009. See also Consumer White Paper, *A Better Deal for Consumers. Delivering Real Help Now and Change for the Future*, Cm 2669.

allegations against Tesco in Dairy investigation and agrees discount for Tesco not contesting remaining aspects' (30 April 2010)). For such cases, where the loss per unit is very small (a matter of pence per litre of milk) but the overall damage to consumers (and hence to the public interest) is large, ordering a redress scheme would be an appropriate response, in addition to any fining decision. For such claims, even an opt-out class action is unlikely to be an efficient means of redress, given that identifying the exact level of purchases of claimants will be extremely difficult, and the motivation of each individual consumer to come forward to claim its share of a fund would be very weak.'

They therefore argue that since an opt-out class action would not work, a redress order 'ought to enable the OFT to require infringers to make redress not only by offering money compensation but also, in appropriate cases, by offering better terms to their customers.'

Thus, there are two conclusions. Firstly, a public redress power should be effective in delivering compensation in small dispersed mass damage situations, certainly involving consumers and possibly SMEs. Secondly, an opt-out private collective action would in fact be ineffective in exactly those situations. Therefore, these realizations will be likely to increase the pressure on the authorities and government to ensure that the public power is available and used.

The problem is illustrated by the *Cardiff Bus* case,¹⁰⁹ in which OFT expressed the view that there might be an infringement but declined to act as the level of detriment was not large.¹¹⁰ A private action was subsequently fought at huge cost, over some years, resulting in a CAT award of £33,818.79 in compensatory damages plus loss of interest, which was clearly grossly uneconomic in terms of cost-benefit, even with the exemplary damages of £60,000 awarded exceptionally in this case. 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 benefited.

Should public authorities be involved in compensation?

The different approaches between the German and British competition authorities over whether compensation or skimming off (which are aspects of the same issue) are part of their core role is striking. In short, the Germans regard skimming off as an integral part of their enforcement duty whereas the British competition authorities do not regard either skimming off or compensation as part of theirs, contrasting with the attitude of other British prosecutors and sectoral regulators. However, there may be several reasons why the British competition authorities' attitude will change.

The OFT has argued that it only wishes to get involved in compensation issues infrequently and to a limited extent. Will that happen in practice, or will there be pressure for the authority to be

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

¹¹⁰ Decision No CA98/01/2008, 18 November 2008.

more involved in delivering compensation? OFT also argues that it would require substantial additional resources if it were to be given a power to require undertakings to set up redress schemes (power 4, 3 or 1). That would not be the case with powers 6, 7 or 9, nor where the power is sufficiently large to induce negotiated solutions and short-circuit the full formal process.

The case for avoiding duplication of effort and costs in separate, sequential public and private enforcement actions is clear, and widely supported. The Consultation cited Morten Hviid's point that follow-on damages claims are 'potentially entirely wasteful...rather than forcing the case to be run again to secure damages, it would be worthwhile at least considering giving the competition authority the power to use settlement procedures to set up mechanisms to compensate those harmed.'¹¹¹

Further, it is clear that where the powers are designed effectively, public authorities have been able to deliver compensation swiftly and cost-efficiently. It is the ability to resolve the *combination* of public and private consequences that provides the crucial incentive for swift settlement of both sanctions and compensation. As the Danish experience shows, firms that rely on market reputation have incentives to (a) avoid the reputational loss and cost of a private collective action, especially if full joint and several liability can be avoided, and (b) the possibility of a reduction in fine by paying compensation swiftly before the fine is set.¹¹²

The argument that restoration of market balance, and hence compensation, is not the function of a public authority is looking thin and outdated. Hodges has pointed out that the current enforcement policies of European competition authorities fail to identify whether the combination of public and private enforcement has achieved restoration of market balance or competitive conditions, or are even capable of identifying the extent to which infringers' anti-competitive activities have distorted the market.¹¹³ Thus, it should be the duty of a competition regulator to ensure not just that compensation is paid, but to establish how much is paid. That proposition was supported by Which?.¹¹⁴ Ezrachi and Ioannidou have recently summarized that the black line distinction between the functions of a public and private actors has started to crumble. It is no longer appropriate that public actors just deal with findings of infringement in those cases that they choose to deal with and only then impose fines, but do not look at the restorative functions and the market effects.¹¹⁵

The argument that the public authority's limited resources should not be diverted from its principal role (investigation, enforcement and deterrence) is countered by the empirical evidence that certain enforcers are able to reduce the time spent on the enforcement process if they have

¹¹¹ at <http://competitionpolicy.wordpress.com/2011/05/03/why-private-enforcement-should-be-reformed-alongside-public-enforcement/>

¹¹² Response by Mulheron and Smith notes: '... many companies will, we believe, wish to be seen to make good the harm caused to restore their reputations and will wish to avoid an *order* if at all possible. This will particularly be true where an undertaking applies for immunity or seeks to settle a public enforcement proceeding.'

¹¹³ C Hodges, 'European Competition Enforcement Policy: Integrating Restitution and Behaviour Control' (2011) 34(3) *World Competition* 383.

¹¹⁴ Response by Which?

¹¹⁵ A Ezrachi and M Ioannidou, 'Public Compensation as a Complementary Mechanism to Damages Actions: from Policy Justifications to Formal Implementation' [2012] *Journal of European Competition Law & Practice* ..

the right powers, and hence increase their throughput of cases. The Danish Consumer Ombudsman is an example of such efficiency, and this is also indicated by the FSA's use of new powers that it received in 2010, and evidence from Ofcom. The point is that the addition of a compensation power to investigation and sanctioning powers can short-circuit time spent in establishing *infringement*, since the incentive for the firm is to reach 'global peace' in a single negotiation.

Overall, it may be asked why competition enforcers have not used such restorative powers before now. It is understood that the OFT was requested to approve compensation arrangements in various cases, including the construction and air freight cartels, but it refused.

How big should the incentive be?

A further finding is that although the use of wide formal powers (such as to institute a class action or impose a redress scheme) might involve significant cost if the power were used in an individual case, the power is intended to function as a major ultimate threat, and *not* to be used frequently, let alone in every case. It is part of the enforcer's armoury, a 'big stick' or 'nuclear deterrent'. It is intended to function together with a range of other powers, inducements and levers, to induce infringing firms to institute voluntary owning-up, redress schemes and better practices, and to enable acceptable compensation arrangements to be negotiated as part of a global settlement of all public and private aspects. It is apparent, therefore, that if successful settlements are to be achieved, the power needs to be large enough. Further, deterrence has no obvious place in incentivisation.

The Consultation dismissed the positive Nordic experience and expressed a concern that the U.K. authorities would merely be sued for using a restorative oversight power.

'5.48 The Government is also not convinced by the Danish and other Nordic examples that a public approach would lead to fewer cases needing to be brought and fewer appeals. Approaches to such matters vary drastically from country to country and, in the UK, Government bodies are routinely challenged and judicially reviewed, and a significant number of anti-trust decisions by the OFT are taken to appeal. A further concern is the potential impact of such a power on the leniency regime, and hence on cartel detection and enforcement¹¹⁶.'

However, that view overlooks how the Nordic and FSA powers work in practice. Firms that agree solutions with regulators do *not* generally then challenge them in the courts.

Incentivising firms is vital, through the ability to be flexible on public sanctions. Power 11 is vital, and increasingly used. This flexibility in use of the 'carrot' not necessarily involve a reduction in a fine. In a number of cases, authorities have closed files without imposing public sanctions, or have agreed behavioural solutions. Power 11 can act as a considerable incentive,

¹¹⁶ The OFT has issued 52 decisions to date. These include infringement, non-infringement and no grounds for actions decisions, but exclude interim measures and commitments decisions. 25 of these decisions have been appealed. Of the OFT's 28 infringement decisions, 19 have been appealed.

but its power varies depending on the extent of the range of deductions that may be offered, and are offered in relevant cases. If only small deductions in fines are possible and made, then the considerable potential that power 11 can induce will not be created.

In this respect, it may be questioned whether the Government's proposals involve sufficient incentivisation. The Government and virtually every respondent agreed that there should be a reduction in the fine if compensation were paid. It will be seen that an inconsistency arises between the incentives of the leniency programme to identify an infringement and the compensation programme: in the former the fine is completely waived, whereas in the latter it might be reduced a 'modest (five to ten per cent)' extent.¹¹⁷

'6.30 In particular, the Government would not wish steps taken by a company to make redress to cause the level of fines to be significantly reduced. To do so could undermine the deterrent impact of sanctions, a crucial means of driving competition law compliance. Whilst redress is also important, it should not be achieved at the expense of deterrence¹¹⁸.'

The conundrum was noted by Which?:

'We believe an effective opt-out system should provide an adequate incentive for a carteliser to enter into a voluntary redress scheme: if a significant damages claim is a realistic possibility, there should be significant benefits to the company in terms of time and costs to settle early as part of the enforcement process and avoid a later court case. A similarly incentive would also arise if the OFT has the ability to impose a redress mechanism on a carteliser.'

An economic calculation that would justify this would be that the level of fine should be reduced by the amount paid in compensation. (But that approach would ignore the deterrent effect of the fine.) The mere existence of a greater power would increase the incentive to negotiate and settle, reaching a swift solution in which all aspects of public and private consequences can be resolved speedily and together at the same time.

The Consultation asserts that:

'...the argument that fines must be reduced if companies are to have an incentive to voluntarily make redress would only be true if there was no private means of effectively pursuing the company through the courts. If a new and effective collective actions regime for competition is introduced, companies found guilty of infringement will face a significant risk of a legal case to cause them to make redress.'¹¹⁹

It is interesting to note the inconsistency between different Departments in the following statements by Government in the related context of tackling serious corporate economic crime,

¹¹⁷ Consultation, para 6.46.

¹¹⁸ http://www.of.gov.uk/shared_of/consultations/of423con.pdf

¹¹⁹ Consultation, para 6.44.

and proposing ‘plea bargaining’ under ‘deferred prosecution agreements’ to a notably greater extent that espoused by BIS:

‘The present justice system in England and Wales is inadequate for dealing effectively with criminal enforcement against commercial organisations in the field of complex and serious economic crime.’¹²⁰

‘There are currently insufficient incentives for commercial organisations to engage and cooperate with UK authorities at earlier stages to achieve better outcomes.’¹²¹

‘If more offending commercial organisations are to be brought to justice and if offending is to be dealt with more quickly and efficiently, the ... prosecuting agencies need additional tools. In order to tackle the spectrum of serious economic crime more effectively and efficiently, any new tool should:

- be effective in tackling economic crime and maintaining confidence in the justice system of England and Wales;
- have swifter, more efficient and cost effective processes;
- produce proportionate and effective penalties for wrongdoing;
- provide flexibility and innovation in outcomes, such as restitution for victims,
- protection of employees, customers and suppliers, and compliance audits;
- drive prevention, compliance, self-policing and self-reporting; and
- enable greater cooperation between international crime agencies.’¹²²

‘114. In relation to the financial penalty condition of a DPA, we propose that there should be a principle of reduction of the penalty amount for cooperation by the commercial organisation in proceeding to a DPA outcome. This would be akin to the principle in criminal proceedings that a sentence is reduced where a guilty plea is entered. Such a principle would apply only to the penalty that might be contained in a DPA and not to other financial terms and conditions such as disgorgement of profits or benefits or reparation to victims.

115. In our view such a principle would be vital to incentivising commercial organisations to co-operate, and would reflect the time and resource savings for the prosecutor and for the courts that would follow as they would for a guilty plea in a case that was prosecuted. However, we consider that there should be a maximum reduction, in the region of one third of the penalty that would have been imposed on conviction in a contested case. A reduction of one third combined with the fact that the commercial organisation will not have a conviction recorded would be sufficient to incentivise cooperation, whilst ensuring that the penalty imposed would properly reflect the seriousness of the wrongdoing.’

In short, the Ministry of Justice has concluded that, in relation to serious crime, prosecution agreements can be effective but only if there is a clear prospect of a sufficiently attractive reduction in the sanction.

¹²⁰ *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (Ministry of Justice, CP9/2012, May 2012), para 23, available at https://consult.justice.gov.uk/digital-communications/deferred-prosecution-agreements/supporting_documents/deferredprosecutionagreementsconsultation.pdf

¹²¹ *Ibid*, para 31.

¹²² *Ibid*, para 30.

So the general conclusion in relation to competition compensation is that the size of the incentive to bring about voluntary payment or negotiations with the authorities must be sufficiently attractive and identifiable in advance to induce infringers to act. In theory, private individual and collective action techniques could be ‘a significant incentive’ to make redress via an ADR settlement. However, that assumption crumbles if the private action threat proves to be ineffective. For the reasons discussed below, that may be the case. If so, there will be increased pressure to use the public redress power, since enhancing that would provide the only effective incentive.

D. OPTION 3: PRIVATE ACTION

The third option for obtaining compensation is through bringing a private action for damages. A private action may be brought by an individual, or on a representative or collective basis. As with the other two tracks discussed above, there are a number of options by which mass claims may be processed. Individual actions may be formally joined or remain unconsolidated but be managed together under the courts’ case management powers. Indeed, during the past decade the English and Welsh courts have largely abandoned consolidating individual claims under the Group Litigation Order procedure since their case management powers can provide greater flexibility.

The following additional options are available specifically for competition claims. Any person who has suffered loss as a result of an infringement of competition law may institute a claim for damages before the CAT¹²³ as well as the Chancery Division. Multiple individual damages claims that all relate to the same infringement may also be brought in a representative capacity by a ‘specified body’ provided, firstly, it has been established (by either the OFT or the European Commission) that an infringement of competition law has occurred¹²⁴ and, secondly, each individual has consented to the claim being brought. Any body may apply to the Secretary of State to be ‘specified’ on the basis of published criteria.¹²⁵ Only one body has been approved to date, the consumers’ association Which?.¹²⁶ Which? has brought one collective damages claim, after a finding by the CAT that various companies were involved in a cartel to fix the prices of replica football T-shirts.¹²⁷ The popular perception of this case was that the association was frustrated by the opt-in requirement in not being able to facilitate compensation for more consumers. However, the company had already been pressured by adverse publicity into making voluntary *ex gratia* offers to many customers, so it was unsurprising that the number who opted-in to the subsequent action was low.¹²⁸

¹²³ Competition Act 1998, s. 47A & B.

¹²⁴ This is known as a ‘follow on’ claim, as opposed to a ‘stand alone’ claim.

¹²⁵ Guidance for prospective specified bodies is available at <http://www.dti.gov.uk/files/file11957.pdf>.

¹²⁶ The Specified Body (Consumer Claims) Order 2005, SI 2005/2365.

¹²⁷ See http://www.which.co.uk/reports_and_campaigns/consumer_rights/campaigns/Football%20shirts/index.jsp.

¹²⁸ See C Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart Publishing, 2008), p 24ff.

Private action as the last resort

It was said above that the private damages action is the third option that will be available.¹²⁹ The sequencing issue has not been widely understood: many wrongly assume that an opt-out class action procedure would be readily available. The policy that litigation should be a last resort was established in 1999 for the civil procedure system¹³⁰ and has been repeated by the Coalition Government,¹³¹ both in general and in relation to numerous types of disputes, including public sector bodies,¹³² tax disputes with the state,¹³³ family disputes,¹³⁴ and employment disputes.¹³⁵

This policy is implemented in the following rules. Civil procedure and the courts are governed by general principles,¹³⁶ including the court having managerial control of all cases, and an overriding objective of dealing with cases justly.¹³⁷ This approach emphasizes the importance of settling cases. Settlement is promoted through pre-action protocols,¹³⁸ a ‘nudge’ in the

¹²⁹ The ‘last resort’ policy was also adopted by the 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>.

¹³⁰ Lord Woolf, *Access to Justice: Interim Report* (1995) and *Access to Justice: Final Report* (1996). The Final Report stated: ‘9. .. *Litigation will be avoided wherever possible.* (a) people will be encouraged to start court proceedings to resolve disputes only as a last resort, and after using other more appropriate means when these are available. ...’ [original emphasis]

¹³¹ See the Ministry of Justice’s *Proposals for the Reform of Legal Aid in England and Wales* (November 2010) ¶ 1.8.

¹³² *The Dispute Resolution Commitment: Guidance for Government Departments and Agencies*. In the context of disputes involving the Government itself, this states that “it is government policy that litigation should usually be treated as the dispute resolution method of last resort” (¶ 1.4).

¹³³ See *Resolving Tax Disputes. Practical Guidance for HMRC Staff on the Use of Alternative Dispute Resolution in large of complex Cases* (HMRC, 2012) at <http://www.hmrc.gov.uk/practitioners/adr-guidance-final.pdf>.

¹³⁴ Legal aid is not available unless the parties have attempted mediation. See also D Norgrove, *Family Justice Review. Final Report* (Ministry of Justice, 2011).

¹³⁵ Under the Enterprise and Regulatory Reform Bill 2012 all prospective claimants will be required to contact ACAS before instituting proceedings.

¹³⁶ The revolutionary approach adopted in the Civil Procedure rules 1999 was based on reports by Lord Woolf, *Access to Justice: Interim Report* (1995) and *Access to Justice: Final Report* (1996).

¹³⁷ CPR 1.1(2) specifies the following aspects of what this means:

“Dealing with a case justly includes, so far as is practicable –

- (a) ensuring that the parties are on an equal footing;
- (b) saving expense;
- (c) dealing with the case in ways which are proportionate-
 - i. to the amount of money involved;
 - ii. to the importance of the case;
 - iii. to the complexity of the issues; and
 - iv. to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.”

¹³⁸ In which claimants give full disclosure of their cases and evidence before instituting proceedings, and defendants then give full responses within a time limit. The Practice Direction on Pre-action Conduct emphasises that litigation should be a last resort.

Allocation Questionnaire that a party has to complete at the start of the procedure,¹³⁹ the availability of alternative dispute resolution mechanisms, the active encouragement of judges to use them,¹⁴⁰ a professional duty on solicitors to advise on outcome options,¹⁴¹ and judges' discretionary power in awarding litigation costs.¹⁴² The Court of Appeal has specified guidance on circumstances in which judges may penalise litigants who unreasonably refuse ADR.¹⁴³

It is important to realize, therefore, in considering the operation and impact of the proposed private class action procedure, that it will *not* automatically be available to claimants, lawyers and funders on an unrestricted basis. This point is not mentioned in the Consultation, but it has major impact in practice. Not only will ADR be available as a preliminary option, possibly through an enhanced competition-specific ADR facility, but there will also be one or more new regulatory procedures that will be available. Accordingly, rational attempts must be made to apply *both the ADR and regulatory tracks*, and any other possible option, before commencing litigation.

Indications from Empirical Data

The situation has to be seen in the light of empirical evidence of reality and need. Some research data is available, as are the Government's speculative calculations. The Impact Assessment accepts that the minimum threshold of viability for bringing an individual case is damages of £500,000, and more like £3m,¹⁴⁴ given that costs per case are between £6m and £9m for stand-alone cases and between £3m and £5.4m for follow on cases.¹⁴⁵ 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.¹⁴⁶ In the JJB Sports case, individual payments were between £10 and £20.¹⁴⁷

¹³⁹ Civil Procedure Rule (CPR) 26.4 provides that a party may, when filing the completed allocation questionnaire, make a written request for the proceedings to be stayed while the parties attempt to settle the claim by ADR or other means. Parties are required to state in the questionnaire whether they want to attempt to settle the claim at that stage; if they say no, they are required to give reasons why. Legal representatives are required to tick a box confirming that they have explained to their clients the need to try to settle, the options available, and the possibility of costs sanctions if they refuse to try to settle. The preamble to Section A of Form N150 states: 'Under the Civil Procedure Rules parties should make every effort to settle their case before the hearing. This could be by discussion or negotiation (such as a roundtable meeting or settlement conference) or by a more formal process such as mediation. The court will want to know what steps have been taken. Settling the case early can save costs, including court hearing fees.'

¹⁴⁰ ADR is an agenda item on Guides for Case Management Conferences. CAT Rule 44 (3) provides: 'The Tribunal may in particular ... Encourage and facilitate the use of an alternative dispute resolution procedure if the Tribunal considers that appropriate...'

¹⁴¹ Code of Conduct 2011, O(1.12).

¹⁴² CPR Part 44.3(5) states: 'the court will take into account conduct of the parties, including pre-action conduct, when deciding whether to award costs'.

¹⁴³ *Halsey v Milton Keynes General NHS Trust [2004] EWCA Civ 576* and *Burchell v Bullard [2005] EWCA Civ 358*. In the latter, the court penalised a party who unreasonably ignored an offer to mediate made at the pre-action stage.

¹⁴⁴ Impact Assessment, paras 67 and 85.

¹⁴⁵ Impact Assessment, table 5, p 19.

¹⁴⁶ Impact Assessment, para 156, citing *The deterrent effect of competition enforcement by the OFT* (OFT, 2007).

¹⁴⁷ http://oft.gov.uk/news-and-updates/press/2003/pn_107-03

The number of cases brought that raise competition breaches is unknown. The Rodger study¹⁴⁸ found that there were a total of 41 (interim or other) judgments in competition litigation cases in the U.K. between 2005 and 2008, thus averaging about 10 judgments per year, in 29 of which the claimants raised a competition law issue. Of the judgments, 25 were first instance, 9 in the CAT, and 7 appeals. The litigant relying on competition law was unsuccessful in 48.8% of cases, successful in 43.9%, partially successful in 7.3%. Seven cases (12 judgments) were follow-on actions; 29 were not follow-on. The number of cases brought by claimants who raised a breach of competition law, whether stand-alone or follow-on, and their success rates, is unclear from the data. The Impact Assessment stated that the research showed that only around 30% of cases were follow-on, a total of 3 per year.

The Rodger 2009 survey of legal practitioners indicated that there were 43 out-of-court settlements between 2000-5 related to anticompetitive practices, about 7 per year.¹⁴⁹ The outcomes led to payment of damages in 23.2% of those settlements, agreement as to future conduct in 27.9%, a combination of both those outcomes in a further 20.9%, withdrawal of the claim in 11.6%, and some other outcome in 16.3%. There was some difference between the levels of damages claimed and paid at under £20 million levels.

Damages	Damages sought: Frequency	Damages sought: Per cent	Damages obtained: Frequency	Damages obtained: Per cent
Under £1 million	10	23.3	5	11.6
Between £1 million and £5 million	8	18.6	3	7.0
Between £5 million and £20 million	4	9.3	1	2.3
Over £20 million	10	23.3	10	23.3
N/A	11	25.6	34	79.1
Total	43	100.0	43	100.0

The competition pro bono scheme receives around 100 enquiries a year, of which around 30% are rejected and the remainder referred on to lawyers on the panel for further advice. Ultimate outcomes are unknown. The overwhelming majority of complaints relate to vertical arrangements between suppliers and distributors.¹⁵⁰

In 2000-2007, there were 21 findings of infringement by the OFT under the Competition Act 1998. The Consultation states that, according to the Rodger study, a damages claim could have been brought by individual businesses in the U.K. in 13 of those 21 OFT infringement decisions.¹⁵¹ However, follow-on claims were made in only two cases in the High Court.¹⁵² The

¹⁴⁸ BJ Rodger, 'Competition law litigation in the UK courts: a study of all cases 2005-2008- Part I' (2009) *Global Competition Litigation Review*, 93-114; BJ Rodger, 'Competition law litigation in the UK courts: a study of all cases 2005-2008- Part II' (2009) *Global Competition Litigation Review*, 136-147.

¹⁴⁹ BJ Rodger, 'Private Enforcement of Competition Law, the Hidden Story: Competition Litigation Settlements in the UK, 2000-2005' (2008) *E.C.L.R.* 96.

¹⁵⁰ *The Competition Pro Bono Scheme: 500th Query Review* (Greenberg Traurig Maher, 2011); supplemented by information kindly provided by Stephen C Tupper.

¹⁵¹ BJ Rodger, 'Private Enforcement of Competition law, the Hidden Story: Competition Litigation in the United Kingdom, 2000-2005' [2008] *E.C.L.R.* 96.

Consultation *assumed* that there have been around two settlements for every follow-on case, which suggested that a further four of the 13 cases were resolved. That left seven cases over the course of eight years: an average of just under *one per year*.

The Consultation speculated that payouts per case in U.K. might be in the range £1m-£5.5, with an average of £2.6m, based on an extrapolation from the ratios of fines to damages in Canada and Australia (the latter having minimal data) of respectively 0.3 of the fine to 1.53 of the fine, with an average of 0.8.¹⁵³

The various approaches adopted in the Impact Assessment raise a series of concerns.¹⁵⁴ The Impact Assessment stated that there are currently 10.25 competition cases per year in the U.K.¹⁵⁵ [These appear to be all cases, not just damages cases.] The Impact Assessment then adopted 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".¹⁵⁶ The Impact Assessment assumed, 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 *1 extra follow on case, and 1.75 extra stand alone cases a year*.¹⁵⁷

There are, however, several methodological issues with BIS' calculations. 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 there is an estimation of the impact of introducing opt-out collective actions (option e).¹⁵⁸ 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,¹⁵⁹ and that the best estimate (the Canadian position, for which the data is thin, but not as miniscule as the figures for Australia 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*.

¹⁵² Ibid, pp. 93-114. The cases were *English, Welsh and Scottish Railway Ltd vs. E.On UK Plc* and *Devenish Nutrition Ltd vs. Sanofi-Aventis SA France*; the latter proceeded to the Court of Appeal.

¹⁵³ Impact Assessment, para 122.

¹⁵⁴ The author is indebted to Dr Chris Decker for the following analysis.

¹⁵⁵ Impact Assessment, table 4, p 19.

¹⁵⁶ Impact Assessment, para 77.

¹⁵⁷ Impact Assessment, table 7, p 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).

¹⁵⁸ Impact Assessment, commencing at para 196.

¹⁵⁹ Impact Assessment, table 13.

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.¹⁶⁰ Yet the values of costs and damages vary between the two jurisdictions, so the assumption is speculative.

Taken together, the above data gives rise to concern about the financial viability of ‘lower value’ cases, and the low number of damages cases that would be brought. In simple terms, we do not seem to be talking about many cases, and those that exist might never be brought. These figures raise serious questions over whether the Government has satisfied its policy of only legislating where there is clear evidence of need.¹⁶¹

New Empirical Evidence of Competition Problems and Patterns of Litigation

A research study on private enforcement of competition law in the EU from 1999 has revealed highly relevant data and findings about the types of problems that are arising and being litigated.¹⁶² The findings included:

- far more private enforcement cases have been brought than were thought to have existed in all large Member States;
- private enforcement of competition law is mostly used by businesses in commercial contract (B2B) disputes, often as one of a number of arguments that are primarily about contract law rather than competition law, and sometimes raising competition arguments as defences; accordingly, the question was raised whether competition law could be better integrated within other commercial or consumer trading law and systems, so as to be more effective;
- speed of response to competition infringements is of paramount importance, so injunction remedies are far more important than damages;
- there have been almost no small value mass consumer claims based on competition law in any Member State. The reasons are multiple, including the inherent complexity of competition law and of establishing issues such as dominance or that a cartel exists, problems of proving quantum of damage, high cost of both litigation and distribution of funds, grossly disproportionate and unattractive cost-benefit ratios for funders of litigation. It was questioned whether litigation could ever be an effective answer to such problems in the European context.

The Risk Proportionality Requirement

Given the above insights, how many cases will be left unresolved by the new ADR and regulatory tracks and thus be candidates for private individual or mass litigation? It is necessary

¹⁶⁰ Impact Assessment, para 193.

¹⁶¹ ‘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>

¹⁶² AHRC Research Project on EU Competition Law: Comparative Private Enforcement and Collective Redress in the EU 1999-, led by Professor B Rodger of Strathclyde University, see www.clcpecreu.co.uk; results were reported at a conference held in London on 15 September 2012.

to look at B2B and C2B claims separately. In relation to individual claims, it is clear from the Strathclyde-led study quoted above that some B2B claims are brought. There remains a question over what barriers exist to such claims. There can be the problem that some businesses may be reluctant to sue companies with whom they need to continue to deal with, but the solution to that issue cannot be a litigation one. In relation to consumer or small ultimate purchaser claims, the first practical hurdle is that of finding funding.

If any funder is to invest in a case, the risk-benefit ratio needs to be sufficiently attractive to satisfy the funder's risk proportionality requirement. The calculation is affected by multiple factors, especially in collective litigation, and in complex litigation such as competition damages cases. Some legal systems, notably the U.S.A., consciously incentivise private actions by removing barriers to litigation and inserting 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).¹⁶³ But in European legal systems, most of the American incentives are not accepted, and instead safeguards are in place against abuse. The funder's calculation in Europe must, therefore, take into account factors such as the following:

- the cost of funding the case (fees of courts, lawyers and experts), and the cost of finance over the lifetime of the case;
- the chances of success;
- the amount that might be recovered at the end if the case is won (both from the defendants and, if the funder is not a party, from claimants)
- whether the investment risk is rational and the return is sufficient.

The Government's rhetoric is that individuals should be empowered to exert their own rights.¹⁶⁴ But the simple economics of competition damages litigation make it highly questionable whether consumers, consumer associations or SMEs and their associations would themselves be able to fund collective litigation, or would be acting rationally or properly with use of others' funds if they did so.¹⁶⁵ The evidence is that larger businesses have the resources to fund litigation,¹⁶⁶ but consumers and SMEs do not. The European consumer body has recently said: 'Without appropriate funding, no collective redress mechanism will work in practice.'¹⁶⁷

If funding is not to come from consumers or SMEs or their representatives, it must be provided independently. The state will no longer fund private actions of this kind. Companies in some jurisdictions have legal expenses insurance, albeit subject to limits and conditions. Otherwise,

¹⁶³ 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).

¹⁶⁴ The Consultation includes the following statements: '3.9 However, consumers and businesses also have a fundamental right to seek redress for themselves for damages that they have suffered.' and '6.26 ... The Government believes that empowering those who have suffered loss to take direct action against those who have caused it is the best way, in general, to increase deterrence and secure redress.'

¹⁶⁵ The risk of adverse costs is omitted from all U.S. analyses, such as that of McAfee *et al* quoted in the Consultation, 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.

¹⁶⁶ Responses by CBI, International Chamber of Commerce and City of London Law Society.

¹⁶⁷ *Litigation funding in relation to the establishment of a European mechanism of collective redress. BEUC position* (BEUC, 2012), at <http://www.beuc.org/custom/2012-00074-01-E.pdf>

the two main sources of independent finance for consumer or SMEs are lawyers and litigation funders. Both those groups can be incentivised to act if the return on investment is sufficient. Lawyers might act if the fee for success is sufficiently attractive, taking into account the risk of a case. They might also act on a *pro bono* basis, but this is unlikely in relation to lengthy and expensive litigation. Litigation funders have emerged to fund competition damages cases.¹⁶⁸ Lawyers have historically not acted on group actions in England and Wales unless there was funding from legal aid.¹⁶⁹ They have not been attracted by the conditional fee arrangement (CFA) regime of the past decade in relation to mass actions: a small number of co-financed cases have occurred outside the competition area. It will be interesting to see whether the recent extension of contingency fees from Employment Tribunals to *all types* of claims (as ‘Damages Based Agreements’)¹⁷⁰ has an effect on lawyers’ attitudes.¹⁷¹ But the availability of litigation funding in the past five years has had a further chilling effect on lawyers’ desire to assume risk: the incentives for both lawyers and funders has been to pay lawyers on hourly rates, leaving all the litigation risk and benefit with funders.

Litigation funding can be available for individual claims that have sufficiently good prospects of success, but must involve damages of at least £500,000 and more likely £1 million.¹⁷² There are concerns about independent litigation funding,¹⁷³ but it is expanding across Europe. The state of the litigation funding market is that a number of major funders based across Europe do invest in certain large competition damages cases.¹⁷⁴ Funders currently take 30 to 40% of victims’ recoveries, usually *net*, after legal and financing costs. If they were to fund small consumer claims, that level of cost would reduce any gain for consumers to negligibility.

¹⁶⁸ For a recent review 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>

¹⁶⁹ 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 some decades.

¹⁷⁰ 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>

¹⁷¹ The author’s guess is that lawyers are generally risk-averse and that only a few lawyers will accept the financial risk and commitment of accepting mass or stand-alone competition damages cases. There may instead be vocal complaints about an absence of access to justice, and from business about the U.K. being unattractive for investment because of the perceived litigation risk.

¹⁷² For a recent review 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>

¹⁷³ BEUC considers that third party funding raises various fundamental concerns, and if it is to be endorsed at EU level, precautions and safeguards will have to be taken to ensure risks inherent to this mechanism are eliminated: *Litigation funding in relation to the establishment of a European mechanism of collective redress. BEUC position* (BEUC, 2012), at <http://www.beuc.org/custom/2012-00074-01-E.pdf>

¹⁷⁴ The author has interviewed almost all of the major litigation funders in Europe in the past two years. There is no particular secrecy about their approaches to business, which appear to be consistent and economically rational.

The cases that litigation funders choose are only follow-on cartel cases, and not stand-alone cases. The reasons for that are not hard to understand. A follow-on action might take some years and tie up the capital investment but it has a high likelihood of success, since the authority has already made a finding of infringement. The funder does not have to fund investigation costs on liability in order to assess the chances of success. Instead, he has to investigate the claimant's individual evidence, such as on causation and quantum of loss, so as to make an assessment of the chances of success and whether the net return on investment, after costs, is sufficiently attractive. Some cases will be too small in terms of quantum of damages and hence return. Cases in Europe that involve mass small individual losses are unattractive to funders in view of the problems and cost of individual proof of loss and quantification, and high administrative costs.¹⁷⁵ Further, competition claims *per se* are inherently unattractive to funders because of the inherent challenges of establishing dominance or proving quantum. Those factors make even follow-on competition claims unattractive to funders, and knock out abuse of dominance cases. There is no likelihood that this situation will change in the foreseeable future. Current reality is that only B2B follow-on cases involving large individual damages are sufficiently cost-effective, and offer far more attractive returns than could be obtained from C2B or SME cases.¹⁷⁶

The Consultation itself noted that 'it has sometimes been suggested that stand-alone cases will not occur' and dismissed this by citing a study of collective actions in Canada between 1997 and 2008, which showed approximately 25% of competition cases were stand-alone actions.¹⁷⁷ Comparability is, however, affected by differing levels of damages and costs between the various jurisdictions (Canada itself has several jurisdictions with different rules). The Strathclyde study has shown that a different picture exists in Europe, and it is misleading to consider stand-alone cases without separating the very different types of B2B and consumer cases.¹⁷⁸ The former are brought but the latter are not.

It may be asked whether the litigation economics will be affected by the prospect of earlier settlement than has occurred historically. But here again the picture does not change. The funding cost will be reduced if defendants agree settlements earlier, and do not fight all the way to the end of trial. The availability of ADR might assist earlier settlement but would not itself act as an inducement. The inducement to settle a case will primarily be economic (based on a weighing of the multiple factors of chances of success and cost), and may be to protect market

¹⁷⁵ The Response from UEA noted that 'In the toys case, the cost of distributing the award is likely to be higher than the individual loss of each consumer.'

¹⁷⁶ 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).

¹⁷⁷ Consultation, para 5.13, citing R Mulheron, *Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal* (Queen Mary University of London, 2008).

¹⁷⁸ A study of German competition litigation from 2005 to 2007 found a very low level of follow-on litigation in what the author described as a culture within which litigation is widely used by victims of anticompetitive behaviour: only eight cases, 2.2% of the total sample, followed a prior decision of a competition authority. It also found far wider use of injunctions than damages claims. S Peyer, 'Myths and Untold Stories- Private antitrust enforcement in Germany', Research Paper, University of East Anglia - Centre for Competition Policy (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1672695. See also S Peyer, 'Injunctive Relief and Private Antitrust Enforcement' UEA WP 11-7, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1861861.

reputation.¹⁷⁹ In such a calculation, follow-on cases are inherently likely to settle earlier than (at least some, if not most) stand-alone cases. In theory, settlements in litigation should reflect the relative bargaining position of the parties, principally the merits of the parties' cases, and the relative economic factors, such as which party has greater resource. What happens in practice in litigation is that settlements are agreed at amounts that are less than scientifically rational. This is particularly so in competition damages cases, where the extent of technical evidence and complexity of issues are considerable. Incentives to settle stand-alone cases will be increased where costs, complexity and duration are reduced, or the ability of a defendant to defend itself is lessened. An opt-out model, cost-capping for claimants, presumptions of loss and similar techniques may achieve the latter, but may offend principles of justice. However, even these factors may not be sufficient to induce defendants to settle unless there are added a collection of factors such as a no-cost-shift (or one way cost shift) rule, triple or similarly enhanced damages as standard, large success fees. These factors are not acceptable in European jurisdictions. So the pressures to settle litigation early, that are a factor of the U.S. and some other jurisdictions, will not apply here.

The result is that mass competition damages claims break down into some clearly defined categories. Claims involving a small number of larger businesses are currently brought by the firms involved, with their own funding arrangements (which may include litigation funding outsourcing or legal expenses insurance).¹⁸⁰ Claims involving multiple consumers and SMEs are not brought, since the scale of funding required means that they can effectively only be funded by litigation funders. Funders might be attracted to some SME claims if the size of quantum and net return is sufficient, and the case is a follow-on type. But competition damages cases are complex and expensive. Many SME claims and almost all consumer claims that might be contemplated will not be attractive to litigation funders, on both economic and liability grounds (because they are stand-alone). So the very type of cases that the Government wishes to assist will not be funded, or brought, even under an opt-out class action regime in England and Wales.¹⁸¹

The Impact of Class Action Design Issues on Litigation Rates

The above analysis points to the conclusion that litigation, whether individual or mass, will not succeed in solving the problem of mass problems of ultimate purchasers. That conclusion is

¹⁷⁹ Note the additional and different type of incentive referred to above that comes from certain regulatory powers.

¹⁸⁰ The Response by the ICC stated: '3.21 .. claimants can group and do group together on an *ad hoc* basis to bring consolidated actions in individual cases, for example the claim brought by Deutsche Bahn and other train operating companies in respect of *Carbon and Graphite Products* [2010] EWCA Civ 1284. This enables claims to be brought in an efficient and cost-effective manner, at least by businesses, without any need for a specific mechanism. ... 3.28 ... the business community generally does not require access to any enhanced collective action regime in order to bring private claims in order to obtain redress for breaches of competition law. ... 3.29 The large majority of businesses who may be affected by anti-competitive behaviour can, and do, bring such claims already, as reflected in the significant and increasing number of follow-on claims brought in both the CAT and the High Court (in relation to which the UK is becoming a jurisdiction of choice for claims following on from EU Commission cartel decisions), with many more claims (and pre-claim disputes) settling without proceedings or through ADR.'

¹⁸¹ This conclusion was supported by the Response by Oxera: 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,.'

strengthened by further considerations, notably the effect that the design features of a collective procedure have on the cost of an action.

Several of the important design features of the enhanced collective procedure remain unclear, and are strongly contested by stakeholders.¹⁸² This is important because these design features have, individually and collectively, considerable influence on the financial viability of the class procedure. The result is that the extent to which the class procedure will be used, and will be effective, remains in doubt.

The proposals include shortening procedures (opt-out, a fast track), and simplifying rules of proof (presumption of loss,¹⁸³ access to leniency documents). There are also specific aspects related to funding and costs, such as permitting funding by lawyers or financiers, allowing such funders the incentive of retaining an enhanced fee, making the loser pay the winner's costs, capping the claimants' costs, or ensuring that the claimant(s) or its funder can pay any costs that may be awarded against the claimant(s).

One difficulty in predicting the future volume of litigation is that it cannot be assumed that all of these features will be introduced. The opt-out procedure, and permitting funding by lawyers and third parties, are all contrary to the political consensus expressed recently by the European Parliament.¹⁸⁴ A clear consensus that safeguards are necessary to guard against the risk of a 'toxic cocktail' of 'abusive' collective litigation emerges from statements by the European Commission,¹⁸⁵ consumers¹⁸⁶ and business.¹⁸⁷ Lawyers' success fees have been criticized as

¹⁸² Responses from consumer bodies are largely in favour of features that assist claimants, and those from business favour safeguards for defendants. This is more significant than it would appear. It should be remembered that some businesses, large and small, may be claimants in competition claims. Responses by academics and lawyers are split, some favouring 'one side' or the other.

¹⁸³ It is noteworthy that the Government cited research by Oxera in support of its proposal for a presumption of loss, and a figure of 20%, but in its Response Oxera gave several economic and policy reasons why a rebuttable presumption on cartel overcharges seems unwarranted, and then commented that the Government had wrongly interpreted the figures, since Oxera had found that the median overcharge was 18% of the cartel price—not far from the 20% found by Connor and Lande—and this shows that 20% is not at the 'lower end of the range', as BIS stated.

¹⁸⁴ 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>. The resolution warned against the risks of abusive litigation; calls for strong and effective safeguards to avoid unmeritorious claims and disproportionate costs for businesses *inter alia*: (i) no punitive damages, (ii) no contingency fees, (iii) no third-party financing of collective cases; (iv) maintaining the 'loser pays' rule; (v) any European approach to CR should be based on the opt-in principle; (vi) all necessary measures should be taken to forbid forum-shopping (however no specifications given); (vii) any other features which encourage a litigation culture such as lack of control over the representative entities standing in court, the possibility of lawyers soliciting and actively looking for plaintiffs, and the discovery procedure for bringing evidence to court are not compatible with the European legal tradition and should be forbidden. Actions could be brought only by entities duly recognised at national level e.g. public authorities such as Ombudsmen or consumer organisations, in accordance with a common set of criteria that consumer organisations must fulfil to have a court standing, to be defined by the Commission, in consultation with the Member States.

¹⁸⁵ 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

‘abusive’ by the current government,¹⁸⁸ and the competition damages Consultation notes the risks,¹⁸⁹ and states that the risks can be prevented by certain controls, including certification of a proposed collective action by the court, which will include examining the merits of the case. Irrespective of whether such controls will guard against abuse,¹⁹⁰ experience of class actions in other jurisdictions shows that an examination of the merits of claims at an early stage, essential as that may be, can take a great deal of evidence and argument, and hence involves high and uncertain costs and duration. That is likely to be true of many competition damages claims, since they are unavoidably complex. Those factors make the financing of collective actions more speculative and costly. In short, the more safeguards against abuse that are imposed, the more costly, uncertain and lengthy a collective action will be, and the less likely it will be to attract funding. It is a classic ‘catch 22’.¹⁹¹

There are two technical reasons why an opt-out rule would present difficulties in practice. Firstly, 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

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.’

¹⁸⁶ 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.’

¹⁸⁷ 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’.

¹⁸⁸ In *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson’s Recommendations. The Government Response* (Ministry of Justice, 2011), available at <http://www.official-documents.gov.uk/document/cm80/8041/8041.pdf>, Ken Clarke QC MP and Jonathan Djanogly MP stated: ‘... access to justice for all parties depends on costs being proportionate and unnecessary cases being deterred. It is in no one’s interest for cases to be taken to law aggressively or speculatively and for costs to be out of proportion with the issues to be resolved. Yet in recent years, the system has got out of kilter, fuelled to a significant extent by the way that ‘no win, no fee’ conditional fee agreements (CFAs) now work. They have played an important role in extending access to justice but they also enable claims to be pursued with no real risk to claimants and the threat of excessive costs to defendants. It cannot be right that, regardless of the extreme weakness of a claim, the sensible thing for the defendant to do is to settle, and get out before the legal costs start running up. This is precisely what has happened and it is one of the worst instances of this country’s compensation culture.’ Lord Young of Graffham, *Common Sense, Common Safety* (Cabinet Office, 2010), referred to ‘increasing concerns of a compensation culture’.

¹⁸⁹ The Consultation states: ‘5.32 ... the Government does not wish to bring about a regime in which the correct move for a defendant with a strong and winnable case is nevertheless to settle to avoid the risk of damages or legal costs.’ and ‘5.53 The Government ... has no wish to create a so-called ‘litigation culture’.

¹⁹⁰ It can be questioned whether other proposed controls such as case management or standing of representative parties will have any significant effect on the merits of cases, especially those funded by non-parties.

¹⁹¹ 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.

with the funders, which would have made the action commercially unworkable by them.¹⁹² 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.¹⁹³

Secondly, 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. It is theoretically possible for a single representative to assume the adverse costs liability, but that representative must have sufficient assets. Few individual class members would assume such a risk. Group actions that have been brought historically in England and Wales were either funded by legal aid (no longer an option) or by all claimants entering into a joint funding contract. The latter is theoretically possible but presents considerable administrative challenges and can simply be an unattractive financial proposition for claimants with limited funds, such as consumers or small businesses (SMEs).

Collective Actions in Other European Jurisdictions

The theoretical aspects of the analysis above are supported by further empirical evidence on collective actions in European jurisdictions. Seventeen European States have some form of collective action procedure, almost each one of which is different, some radically so. In most cases, the procedure has been introduced within the past decade. Initial results from a current study indicate that the level of cases in almost every jurisdiction is very low, and that duration lasts several years, with few cases settled.¹⁹⁴

A very short summary of the information is: Bulgaria (one celebrated case failed), Denmark (one case decided, lasting some years), Finland (one case brought by the Consumer Ombudsman), France (one noted consumer association case that lasted several years and failed), Germany (one celebrated investors case that took 10 years to determine there had been no mis-statement in a prospectus, in respect of which a U.S. class action had been settled for \$120 million), Italy (spate of applications since 2010 law, certification arguments and those accepted are expected to last several years), the Netherlands (air freight cartel case, expected to take at least five years; six large non-competition cases settled under the innovative Act on Collective Settlement of Mass Damages (WCAM) 2005), Norway (38 applications between 2008 and 2011, in the first 22 rulings 13 were approved and 9 denied), Poland (42 applications known in 2011, of which 18 were admitted), Spain (four cases since 2000 law), Sweden (12 cases since 2003 law, most against public defendants).

It is too soon to draw final conclusions about the procedures. However, initial indications are as follows. Firstly, in most of these jurisdictions there have been few applications. In some

¹⁹² *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.

¹⁹³ NM Pace, SJ Carroll, I Vogelsang and L Zakaras, *Insurance Class Actions in the United States* (RAND Institute for Civil Justice, 2007).

¹⁹⁴ European Collective Action Study led by the author, with assistance from scholars and practitioners in various Member States. The detailed results should be published by 2014.

jurisdictions there have been multiple applications with a high non-certification rate. Secondly, duration of cases naturally varies between jurisdictions. The impression is that the theoretical advantage that collective procedures will lead to judicial economy is not borne out, and that multiple cases can be complex and take some years. Thirdly, it does not appear that collective cases are settled early. Fourthly, the assertion that ‘collective redress in other European countries has not led to the type of excesses which have plagued America’¹⁹⁵ cannot be substantiated for two reasons. There have been too few cases, and European jurisdictions differ from the U.S.A. (and Australia) in rules that perform as ‘safeguards against abuse and not encouraging private enforcement, as the rules are intended to in U.S.A.

Conclusions on Private Actions

The government’s assumption that a private right of action would solve the problem of competition damages is misguided. Private litigation is no answer for cases where individual and/or total damage is less than the viability threshold. Cases involving B2B firms are brought now and seem to need little assistance. The problem types are cases involving SME claimants and mass consumers. Those typically involve small or limited individual losses, which are not viable for anyone to fund other than a well-capitalised independent third party litigation funder. Such litigation funders currently fund follow-on actions but not stand-alone actions, and appear to find collective actions involving mass small claims unattractive. Litigation funders cannot operate an opt-out collective action model, and require an opt-in model, so as to ensure that all claimants have agreed to their terms and there are no free riders. All of this means that the proposed opt-out class action model will be ineffective for the key claimants for whom it is intended. Moreover, the number of claims that might be brought is quite unclear, but appears to be low.

The argument that private actions unnecessary duplicate public enforcement in follow-on compensation claims is now widely accepted. Accordingly, if the authority is involved, it is going to be cheaper for the economy, and also far quicker for victims, if the authority can somehow bring about payment of compensation by the infringers.

E. GENERAL CONCLUSIONS

This analysis has asked the question: *how* the proposed techniques will work in delivering compensation. The analysis reveals questions about whether some tracks will succeed if they are implemented as proposed. In evaluating the various techniques, the criteria that are relevant, as noted at the start, are the effectiveness, speed and cost of each technique. This analysis has found that the effectiveness of the three tracks depends to a significant extent not just on the ‘internal’ design characteristics of an individual technique but also on the scale of the (internal or external) incentives that are in place to use it.

¹⁹⁵ Response by Consumer Focus.

The voluntary and ADR track offers the fastest and cheapest way of achieving payment if it can be sufficiently incentivised. Firms' may have a number of incentives to instigate voluntary payment, and these can clearly be enhanced by design choices. If optimal use of ADR is to be achieved, it may be necessary to design a sufficiently large incentive, such as achieving the resolution of all public sanctions and private compensation consequences at the same time, or the prospect of negotiating a sufficiently large reduction of the fine or other penalty.

The theoretical incentive of adopting voluntary or ADR behavior by avoiding a class action turns out on analysis to be of limited and probably minor relevance in practice in European jurisdictions. This is precisely because the large incentives to settle that apply under the U.S. litigation and antitrust system do not generally apply in Europe, and would be politically unacceptable here. Even the introduction of some features, such as an opt-out mechanism, would have limited impact, since it will be unusable by funders, who are essential for large damages actions to be brought. Collective actions are likely, therefore, to have very limited utility in achieving compensation for the key groups of consumers and SMEs. If such actions are brought, the incentives for stand-alone cases to settle early appears to be limited. The empirical evidence that is emerging from the relatively low number of collective actions that have been brought across European jurisdictions is that such cases take several years, which increases their cost and reduces financial viability.

The regulatory track offers scope for achieving effectiveness. There is a wide range of options for designing a regulatory power, and selecting the right design is critical to its effectiveness, and ability to achieve very swift solutions at reasonable cost. The larger the power, the greater its force as an incentive and hence the less it is likely to be used in practice, and the quicker it is likely to operate. The conclusion of this analysis is pretty clear: delivery of compensation will overwhelmingly depend in practice on combining the right design of regulatory power with an ADR function.¹⁹⁶

Overall, therefore, the policy question that arises converts from a 'how' question into a 'what' question: which of the levers, and, more practically, what combination of these or other incentives and compulsions, would achieve the optimal result in practice? What incentives or compulsions work best, individually and in what combinations? How can each of these levers be made more effective and efficient? How many levers do you need? And what are the costs and downsides? The answer depends more on reliable empirical evidence than political assertion. However, the current debate is long on assertion and short on empirical analysis. The two key challenges are:

- a. How to improve the ability of those businesses who wish to challenge vertical restraints or abuse of dominance.

¹⁹⁶ Response by *Which?*: 'We query whether the Government is placing too much emphasis on consumers and businesses being able to bring cases themselves, and would instead support a wider range of responses, including the OFT seeking redress on the part of consumers as part of its standard enforcement function; collective follow-on actions will remain the most feasible action but at present the time between abuse and redress can be significant. There appears to us to be significant merit in ensuring that the up-front regulatory response is sufficiently strong to incentivise defendants to try and find a workable solution (such as ADR) before collective redress is even needed.'

- b. How to deliver compensation to those to whom losses are passed on down the chain, whether companies or consumers.

In relation to (a), the B2B and SME problem, the clear answer lies in speedy response rather than damages, and in overcoming the problem that some businesses may be reluctant to sue companies with whom they need to continue to deal with. Some Member States' injunction procedures inherently include significant barriers, whether of costs or complexity of the law (what has to be proved, eg dominance) and the process. The body that has the best expertise on dominance will be the NCA, so it will inevitably be more efficient and quicker in taking action in those cases that are considered to be priorities.

In relation to (b), empirical analysis shows that litigation, whether individual or mass, will not solve the problem. If that is so, solutions have to be sought elsewhere. The regulatory and ADR techniques seem to offer solutions, but only if the incentives are appropriately designed. It is time to rethink policy if the goals are to be achieved.