UK COMPETITION LAW ASSOCIATION

Consultation Response

BIS: Private Actions in Competition Law: a Consultation on Options for Reform

July 2012

1. Introduction and Overview

1.1 This document is submitted on behalf of the UK Competition Law Association ("**CLA**") in response to the consultation launched by the Department for Business Innovation and Skills ("**BIS**") on "Private Actions in Competition Law: a Consultation on Options for Reform" (the "**Consultation**") on 24 April 2012.[1]

1.2 The CLA is affiliated to the Ligue International du Droit de la Concurrence. The members of the CLA include barristers, solicitors, in-house lawyers, academics, and other professionals, including economists, patent agents, and trade mark agents. The main object of the CLA is to promote the freedom of competition and to combat unfair competition.[2]

1.3 By way of introduction, the CLA broadly welcomes the proposals to make the Competition Appeal Tribunal ("**CAT**") a major venue in the UK for private litigation based on competition law. In its twelve years of existence, it has built up a strong

[1] "Private Actions in Competition Law: a Consultation on Options for Reform", available at: http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf.

[2] Further details on the CLA can be found on our website at: http://www.competitionlawassociation.org.uk/.

reputation in its handling of appeals under the Competition Act 1998 ("**CA98**") and Communications Act 2003, applications for review under the Enterprise Act 2002 ("**EA02**"), and follow-on private actions under section 47A of the CA98. It is widely regarded as efficient, fair, and competent. It makes eminent sense, in principle, for the CAT's jurisdiction to be extended so as to make most efficient use of the resources at its disposal. As regards alternative dispute resolution "**ADR**", we agree that it should be strongly encouraged, but do not think that it should be made mandatory in competition private actions.

1.4 The CLA does, however, have a number of concerns with some of the proposals. We do not support the introduction of an opt-out regime or the adoption of a rebuttable presumption of loss. These proposed changes would constitute a radical reform of the English civil justice system and we are not convinced that the evidence shows that such changes are required or wanted. We are especially concerned that these types of changes could lead to unintended negative consequences for the English civil justice system, potentially creating a system that generates considerable income for law firms rather than representing an effective means of redress for claimants and that would place considerable pressure on defendants to settle unmeritorious claims because of the heightened litigation and costs exposure. While we agree that a fast-track mechanism of some kind may encourage small and medium-sized enterprises ("**SMEs**") to bring more stand-alone claims (with or without an application for interim relief), we are not persuaded that the model proposed in the Consultation paper strikes the right balance between facilitating access to court and ensuring that defendants are not unjustly burdened.

1.5 We expand on these points and set out our more detailed comments in response to the Consultation paper in Section 2 that follows below.

2. Specific Points on "Private Actions in Competition Law: a Consultation on Options for Reform"

2.1 This part of the response provides specific responses to the questions raised by the Consultation paper. The numbering below follows the references used in the Consultation paper.

Question 1: Should Section 16 of the Enterprise Act be amended to enable the courts to transfer competition law cases to the CAT?

2.2 In the CLA's view, the answer to this Question[3] is a clear "yes". Indeed, this is something that should have been done years ago, as various commentators have suggested,[4] including the President of the CAT itself.[5] It is anomalous that the CAT should currently have jurisdiction to hear follow-on actions, which may, but do not necessarily, raise issues calling for the expertise of the CAT's lay membership, while at the same time not having the ability to receive substantive competition law issues from the High Court for determination. Even if section 16 were to be "activated", there would be no obligation on a High Court judge seized of a case to transfer the competition law issue(s) to the CAT, but if s/he felt that there was a benefit to the CAT deciding it, that option would be available. As the Consultation paper points out, this would not necessarily result in the High Court judge losing control of the case, at least if the action

[3] The CLA notes that it would not be a question of "amending" the EA02, but rather of the Lord Chancellor using the power already at his disposal, by virtue of section 16 EA02, to make regulations.

[4] *See*, *e.g.*, C. Brown, "Section 16 Enterprise Act 2002 – Time for Activation?" (2007) 28 *ECLR* 488; A. Robertson, "Competition Law in the UK Courts: a Review of the Last 3 Years" (2009) *Comp Law* 79, 97.

[5] *See* Sir Gerald Barling's contribution to the Bar European Group *European Advocate* (Spring 2009).

had been commenced in the Chancery Division, given that all Chancery Division judges are also Chairmen of the CAT (and so s/he could continue to hear the case but in the new forum). [6] We note also that activation of section 16 would enable transfer in both directions. Given what we say about the nature of many stand-alone competition cases, it would be sensible to provide the CAT with the ability to transfer cases to the High Court.

Question 2: Should the Competition Act be amended to allow the CAT to hear stand-alone as well as follow-on cases?

2.3 We agree in principle that the CAT should be allowed to hear stand-alone as well as follow-on cases. It makes sense to deploy the CAT's resources as efficiently as possible, to the benefit of both claimants and defendants. We are concerned, however, that the Consultation paper has not given sufficient consideration to the complexity of many stand-alone cases, which often raise various different causes of action by way of both claim and counterclaim. For example, a claim seeking damages for loss caused by an anti-competitive exclusivity arrangement contained in a lease might be met with a counterclaim for monies owed under the lease.[7]

2.4 It would therefore be important to consider carefully the breadth of the CAT's jurisdiction. For example, should claimants be able to plead other causes of action alongside those relating to competition law? Should defendants be able to counterclaim based on causes of action unrelated to competition law? These issues are not discussed at all in the Consultation paper, yet they would be important practical considerations.

[6] Judges of the Commercial Court are not similarly designated and so, absent wider reform, they would not be able to continue hearing the case in the CAT.

[7] This is the inverse of the [2003] EWHC 1510 (Ch); on appeal [2004] EWCA Civ 637; on further appeal [2006] UKHL 38 litigation, in which the competition law cause of action was pleaded as a "Euro-defence" and counterclaim to the landlord's claim in respect of the lease.

2.5 In our view, it would be inefficient if a defendant were precluded from being able to counterclaim in respect of the same factual matrix. That said, the CAT itself does not necessarily have the requisite expertise to deal with non-competition law issues. One practical solution might therefore be for stand-alone cases to be reserved, in terms of chairmanship, to Chancery Division judges (all of whom are Chairmen of the CAT), sitting as usual with two wing members, at least where counterclaims are made which raise issues unrelated to competition law. Another might be to leave it to the Tribunal, where appropriate, to use its powers to transfer such cases to the High Court pursuant to the secondary legislation "activating" section 16 EA02.

Question 3: Should the CAT be allowed to grant injunctions?

2.6 We agree that, if the CAT is to be given a stand-alone jurisdiction, it makes sense for it also to be made a Superior Court of Record, such that it may entertain applications for injunctive relief.

2.7 One further consequence of such a reform would be that the CAT would be able to punish instances of contempt of court; that again seems to us to be sensible.

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

2.8 We agree that SMEs may currently be dissuaded from using the courts to seek redress for breaches of competition law that cause them loss. The principal hurdle, in our experience, is that of costs; the risk of a substantial liability in costs in the event that the claim fails (or is only partially successful) is a significant deterrent for most SMEs.

2.9 In principle, we agree that a fast-track mechanism of some kind may encourage SMEs to bring more stand-alone claims (with or without an application for interim relief). The difficulty, however, will lie in striking the right balance between facilitating access to court and ensuring that defendants are not unjustly burdened in the process of doing so. We are not convinced, at this stage, that the proposed model strikes the right balance.

2.10 We note that the mechanism proposed is based on the model of the Patents County Court, as it has existed since new procedural rules were adopted in 2010 and 2011, and a new judge appointed on 5 October 2010 (HHJ Birss QC).

2.11 The key procedural changes adopted by the Patents County Court in 2010 and 2011 were:

(a) increased emphasis on written submissions;

(b) no standard disclosure of documents and tightly controlled cross-examination/expert evidence;

(c) maximum damages recovery of £500,000;

(d) maximum costs recovery of £50,000; and

(e) the possibility for transfer to the Patents Court at the first Case Management Conference ("**CMC**"), having considered the parties' abilities to afford litigation and the appropriateness of the forum for the claim.

2.12 The reformed Patents County Court is very much focussed on intellectual property disputes *between* SMEs and has been widely regarded as a success over the last 21 months. This raises the question of whether a similar reform could be as successful for

competition law claims. On balance, we suspect that there would be limited benefit in simply reproducing the Patents County Court model in a competition litigation context for the reasons we discuss below.

2.13 For competition litigation *between* SMEs that are prepared to accept the limitations on evidence, there is no reason to suppose that a similar system would not be effective. In practice, however, we doubt there would be much demand for a process to deal with competition disputes *between* SMEs. The sort of case envisaged in the Consultation paper, where an SME applies for an interim injunction to stop an ongoing infringement of which it has become aware, are almost inherently confined to claims against (allegedly) dominant undertakings, or undertakings with at least some market power, which will frequently be larger enterprises.

2.14 This means that the majority of disputes would be between SME claimants and large enterprise defendants. Even in the Patents County Court, official guidance cautions that such cases may not be appropriate for the "fast-track" procedure, with it being necessary to consider "*other factors… such as the value of the claim and its likely complexity*".[8] The process is specifically designed for cases where the trial is likely to last less than two days and where there will not be a large number of witnesses.

2.15 If the same principles were applied in the proposed CAT fast-track process, we anticipate that most cases either would not be deemed by the CAT to be suitable for fast-track

[8] "Patents County Court Guide" (12 May 2011), page 5, available at: http://www.justice.gov.uk/downloads/courts/patents-court/patents-court-guide.pdf/.

treatment in the first place or (if procedurally permissible) would end up being transferred out of the fast-track at the first CMC. This would be because:

(a) such cases by their nature tend to involve extensive disclosure (the burden of which often falls heavily on the defendant);

(b) such cases tend to require consideration of significant amounts of documentary and witness evidence, and would therefore rarely be suitable for adjudication on the papers and/or following a very short hearing; and

(c) the remedies sought will, if granted, often have a broader impact on the market than the specific case (*e.g.*, injunctions mandating access to an "essential facility").

2.16 It is worth considering as an example the recent *Chemistree* competition litigation in the High Court, where a pharmaceutical distributor (Chemistree) brought competition claims against various pharmaceutical manufacturers (including Teva, Pfizer, and Roche).[9] In that case, the defendants estimated their costs at over £5 million and the claimants at £1.325 million. Although suggesting that these cost estimates were extremely high, Kitchin J (as he then was) accepted that the case raised complex legal and factual issues and ordered the claimants to pay security for costs of £450,000 to cover the period up to and including an interim injunction hearing. Security for costs of £800,000 was also required in the Teva case. It is difficult to see how this kind of competition litigation could be properly heard on a fast-track basis subject to a very low and automatic costs

[9] *Chemistree Homecare v Roche Products* [2011] EWHC 1579 (Ch).

cap. Another good example is afforded by *Purple Parking v Heathrow Airport*.[10] In that case, the claimants, which were SMEs, brought an action in relation to the defendant's abuse of a dominant position in preventing the claimants from accessing the forecourts at Heathrow Airport for the purpose of conducting valet parking services. The trial lasted for 13 days, during which time each side called eight witnesses. Again, it is hard to see how this type of case could be heard on a fast-track subject to a very low, rigid costs cap.

2.17 Rather than seeking to impose a "one size fits all" fast-track with pre-determined rigid cost caps, we would suggest that it would be much better to give the CAT flexibility to apply the approach best suited to the case at hand. Practice Directions (perhaps in the form of an amended *Guide to Proceedings*) could give claimants a degree of reassurance as to what they can expect, perhaps by reference to case studies, without imposing an unhelpful straitjacket that would either have to set the cost cap too high for some cases or, more likely, far too low for others.

2.18 Rather than adopting an approach too closely modelled on the system implemented by the Patents County Court, we would propose adopting an approach modelled on case allocation and the fast-track in the High Court, but with much higher case value thresholds (the current fast-track being irrelevant in almost all commercial disputes because the threshold is so low).

2.19 We would not support limiting the fast-track to SMEs, since it is liable to lead to satellite litigation over who is or is not an SME and will inevitably introduce arbitrary and unfair distinctions. We note that the Patents County Court is not actually limited to SMEs

[10] [2011] EWHC 987 (Ch).

either. We would propose, instead, that the size of the parties should be a relevant consideration in allocation (as it is in the Patents County Court), but that the complexity and value of the case should also be important considerations. Indeed, it is desirable to facilitate the quick and cost-effective resolution of simple competition disputes even if both parties are larger enterprises.

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

2.20 Turning to the design elements, we start with the proposal to "*focus on providing fast access to injunctive relief*" (para. 4.28).

2.21 Firstly, we can see no objection to giving the CAT flexibility in respect of cross-undertakings in damages. The general requirement to offer such cross-undertakings undoubtedly dissuades SMEs from seeking interim injunctions. It would be important, however, to enable the CAT to have regard to all of the circumstances, including the *prima facie* merits of the underlying claim, before deciding on whether to waive or limit the requirement of a cross-undertaking.

2.22 Secondly, it is worth emphasising the difference between <u>interim</u> and <u>final</u> injunctive relief. While applications for the former could be determined speedily, as currently happens in the High Court, claims for the latter (which will inevitably underlie the former) will need to run their course and be determined by reference to the full evidential picture, whether that be evidence of fact, expert evidence, or both. Many cases brought (or defended) by SMEs will raise complex factual, legal, and/or economic issues (the

Crehan litigation[11] is a classic example, bearing in mind that Mr. Crehan was the operator of just two public houses and therefore very much an SME) which, if they are to be dealt with justly, inevitably take time and involve considerable resource. We are concerned that the Consultation paper does not adequately reflect this reality, with the consequence that its proposals – particularly in relation to costs – leave defendants at risk of enormous costs liability, regardless of the outcome of the case itself. We also consider that in many cases it will be unrealistic to hold a trial within six months of the commencement of proceedings, particularly in cases where the disclosure process is likely to be a lengthy one.

2.23 Thirdly, and in a similar vein, the focus on injunctive (or declaratory) relief should not lull the UK Government into thinking that such cases are (always) much less resource-intensive than cases in which damages are also claimed. Determining liability is often a very complex exercise; it is in part for that reason that so many commercial trials are "split" between liability and quantum.

2.24 Turning to the question of cost-capping, we have already highlighted our concerns in this respect. If the CAT is to be given the power to impose a cap in individual cases, we suggest that the decision should not be taken at the very outset of proceedings but only once the CAT has seen the defendant's response to the claim, whether that be by way of a full defence or (say) a strike-out application. As the proposal currently stands, there is a strong risk that the CAT would be deciding on the question of cost-capping without having proper sight of the *prima facie* merits of the claim, which in our view must be an

[11] *Crehan v Inntrepreneur Pub Co Ltd* [2003] EWHC 1510 (Ch); on appeal [2004] EWCA Civ 637; on further appeal [2006] UKHL 38.

important part of the assessment. To assuage any concerns from the claimant perspective, it would be possible to provide for costs protection up until the point at which the CAT decides the cost-capping issue; *i.e.*, there could be a rule that no costs are recoverable from the claimant unless and until the claimant has decided to continue with the claim after the CAT has reached a decision on cost-capping (which it is proposed would occur at the first CMC ordinarily after service of the claim and defence).

2.25 In terms of the level at which costs should be capped, we consider that the suggested maximum of £25,000 is far too low for virtually all competition cases. The maximum should be set at a much higher level, but the CAT should be left to issue guidance as to the factors it will take into account, including the claimant's ability to pay, when assessing the level of a cap in any given case. As discussed in response to Question 4, we would propose having guidance, including case studies indicating the likely cap in a number of different situations.

2.26 As for the proposal to cap damages, we see no justification for doing so. In some cases, SMEs will have suffered considerable financial loss as a result of anti-competitive conduct. It would be contrary to principle to distinguish between SMEs depending on the extent of their financial loss. Moreover, limiting the damages will not necessarily reduce the amount of legal costs involved in trying the dispute. The value of a claim can be both a useful indicator of the complexity of a case and the amount that it would be proportionate to spend fighting it, but there is no necessary link. It would also amount to a strange and arbitrary *quid pro quo* to trade off a reduction in damages payable by a defendant (if the defendant loses) in return for a cap on costs recoverable (if the

defendant wins). The defendant with a meritorious case will almost inevitably lose out and be tempted to settle to avoid unrecoverable costs, whereas the defendant with an unmeritorious case may gain relative to the normal court process.

2.27 It would in our view be preferable to give the CAT the power simply to order that there be a split trial; this would be desirable from the perspective of efficiency and the economical conduct of proceedings, without unfairly prejudicing SMEs which have suffered considerable financial loss.

2.28 We would make two final remarks.

2.29 First, we are concerned about the impact of the introduction of a fast-track procedure on the CAT's own resources. We have not seen anything in the Consultation paper to suggest that the CAT's budget would be increased to cater for the increase in activity that it is intended would follow. In our view, if a fast-track mechanism is to work effectively, it will need the CAT to be properly resourced, such that it will not negatively impact upon the CAT's caseload more generally.[12]

2.30 Second, we would strongly counsel against giving the OFT or CAT the power to write letters to alleged infringers warning them that there is a reasonable case against them (as is mooted in para. 4.35), for the reasons set out in the Consultation paper. Nor do we see how the Competition Pro Bono Scheme (the "**Scheme**") could be given such a power. Those advised under the Scheme are just as much clients of the lawyers who participate in the Scheme as any other. It would be flatly inconsistent with the role of such a lawyer

[12] Incidentally, this same concern (regarding resource provision) applies equally to proposals on allowing the CAT to hear stand-alone cases more generally.

to write letters to third parties other than in their capacity as representative of the client in question.

Question 7: Should a rebuttable presumption of loss be introduced into cartel cases? What would be the most appropriate figure to use for the presumption?

2.31 We do not support the adoption of a rebuttable presumption of loss. We consider that it is problematic in a number of important respects.

2.32 First of all, the Consultation paper refers to a rebuttable presumption of *loss*, rather than *overcharge*. We consider that to be a mistake for three reasons.

(a) Cartelists are much less likely to hold evidence relating to the extent, if any, of a (direct or indirect) purchaser's loss; on the contrary, it is the purchaser who will be best placed in this regard;

(b) It would subject cartelists to a risk of double jeopardy. If direct and indirect purchasers both sue, albeit in separate proceedings, there is a risk that the courts will find that there is insufficient evidence to rebut the presumption in each case. This concern as to double jeopardy would not arise if the presumption related to the overcharge, as it would still be for each purchaser to show that it has actually suffered loss (and the extent of it); and

(c) A presumption as to the extent of loss suffered by a direct or indirect purchaser is in effect the same as introducing a presumption as to whether the passing-on "defence" is a good one (either way). This sits uneasily with the Government's view that the question of passing-on should not be the subject of any new legislation.

2.33 Second, we question whether a presumption of the amount of the *overcharge* would achieve anything of value. In particular:

(a) The overcharge is only one of a number of elements that must be determined in order to calculate the loss suffered by a claimant. In our experience, the other elements (such as the amount of loss passed-through) are at least as contentious and there would therefore be little saving in time or effort.

(b) Claimants and defendants will inevitably argue for higher and lower overcharges respectively. A professional judge is unlikely to give much weight to a presumption in the face of highly detailed and case-specific expert evidence. The presumption will therefore be superseded in every case and there will be no saving of time or effort; and

(c) If anything, a presumption may well make it harder to settle cases. Claimants and their advisers will inevitably fix on the figure of 20% as the (minimum) overcharge they will expect. Defendants, by contrast, are unlikely to be willing to offer anything like 20% as they will see that as the worst-case scenario.

2.34 In any event, we consider that the figure of 20% is far too high. It is based on research of highly questionable provenance that, for example, calculated the average in part from sources such as claimants' statements of case rather than the amounts ultimately awarded to the claimants or paid in settlement. It probably also understated the incidence of low overcharge cartels because such cartels are less likely to have given rise to legal action. Use of a relatively high figure for any presumption risks transforming the system of private actions into one which aims to punish the defendant, rather than merely

compensate the victim; as mentioned at A.6 of the Consultation paper, this latter aim of punishment is more routinely and appropriately pursued by the public competition authorities, rather than by private interests.

Question 8: Is there a case for directly addressing the passing-on defence in legislation? If so, what outcome is desired and how, precisely, should this best be done?

2.35 We do not consider that there is any need to address the question of passing-on. First, and contrary to the suggestion in the Consultation paper, it is fairly clear from the case law that the extent of any passing-on of an overcharge can and should be taken into account by the court in assessing quantum. For example, in *Devenish Nutrition v Sanofi-Aventis*[13] Tuckey LJ said at para. 151 (admittedly *obiter*):

> "*...Devenish is claiming the overcharge as if it were the defendants' net profit so as to avoid having to take into account the fact (if true) that it passed on the whole of the overcharge to its customers. I can see no way in which it could avoid taking this "pass-on" into account in any compensatory claim for damages.*"

2.36 Likewise, in *Emerald Supplies v British Airways*[14], which concerned the question of whether an action could be brought under Civil Procedure Rule ("**CPR**") 19.6 by a "representative" of both direct and indirect purchasers, Mummery LJ said:

> "*After all the applications, arguments, authorities, amendments and adjournments, it is a straightforward Bear Garden kind of case that falls outside*

[13] [2008] EWCA Civ 1086.

[14] [2010] EWCA Civ 1284.

the rule on representative actions. Emerald and those they purport to represent do not all have "the same interest" required by the rule. The persons represented are not defined in the pleadings, either initially or in the proposed amendments, with a sufficient degree of certainty to constitute a class of persons with "the same interest" capable of being represented by Emerald. The potential conflicts arising from the defences that could be raised by BA to different claimants, such as direct purchasers who have "passed on" the inflated price and would not want BA to run that passing-on defence to their claims and those indirect purchasers to whom the inflated price has been passed on and who would want BA to raise the pass-on defence to claims by direct purchasers, reinforce the fact that they do not have the same interest and that the proceedings are not equally beneficial to all those to be represented."[15]

2.37 In our view, the approach of the Courts is the correct one. The passing-on 'defence' is not a defence properly so-called: it is simply a reflection of the principle that a claimant must prove that he has suffered loss as a result of a tort. If, say, a direct purchaser has passed on the overcharge to his purchasers without any loss in sales which would otherwise have been made, then he has suffered no loss at all.

2.38 Moreover, the Consultation paper correctly notes that any legislation prohibiting reliance by a defendant on passing-on would have to be accompanied by a removal of standing for indirect purchasers, for otherwise there would be a strong risk of double jeopardy; yet, as the Consultation paper also notes, this would itself be contrary to EU law, under which

[15] *See also* the Chancellor's judgment at first instance [2009] EWHC 741 (Ch), para. 37.

any person who has suffered loss as a result of anti-competitive conduct in breach of EU competition law must be entitled to bring a claim.[16]

Question 9: The Government seeks your views on how well the current collective action regime is working and whether it should be extended and strengthened.

Question 10: The Government seeks your views on whether the proposed policy objectives for extending collective actions, taking into account redress, deterrence and the need for a balanced system, are correct.

2.39 Questions 9 and 10 are asked against the background of putative proposals for the introduction of an opt-out collective action regime to allow businesses and consumers to obtain redress. The problem identified is focused on the landmark case in 2008 when Which? settled a representative follow-on damages claim against JJB Sports out of court (the so-called "**replica football kit**" case). This was the first and, so far, only representative action initiated under section 47B CA98. This section entitles the Government to approve certain organisations, such as Which?, to commence actions on behalf of consumers in follow-on actions.

2.40 The suggestion in the Consultation paper is that an opt-out system would allow Which? (and other designated organisations) to recover redress for consumers and businesses in a way that cannot be achieved under section 47B, at least for consumers. This may be an over simplification of the problems faced by Which? in the replica football kit case, as well as failing to recognise the arguable success of that case. The action received a great deal of publicity and that publicity was actually supported by JJB itself under the terms of the settlement. More than 600 consumers did come forward and received generous compensation payments under the settlement. Which? however, was disappointed

[16] C-453/99, *Courage v Crehan* [2001] ECR I-6297.

because the consumers who did come forward were only a small fraction of all of those who had purchased football shirts allegedly affected by the infringement. That said, it is also worth bearing in mind that a large number of consumers had already benefited from JJB's offer of a free shirt and mug. That offer by JJB may itself indicate that at least some aspects of the current representative action system are working well.

2.41 Moreover, even to the extent that the level of "take-up" in the replica football kits case might have been modest, it is not clear that this situation would be improved by an opt-out system. Although it might be possible for damages to be claimed in relation to consumers or businesses who were unwilling to come forward to make the claim at the outset of proceedings (*i.e.*, to "opt in"), there is a risk that those same consumers and businesses would still fail to receive any redress to the extent they could not be identified at a later stage (absent customer records held by the defendant companies) or if they otherwise remained ignorant of any settlement that had been achieved and from which they were subsequently entitled to claim (*i.e.*, had an opt out system been adopted). Accordingly, to the extent that consumers did not come forward to be identified perhaps owing to inertia, the low sums involved, a voluntary redress scheme offered by the defendants, or difficulties in evidencing purchase given the passing of time, an opt-out system may not always provide any greater redress for those harmed by cartel activity. In this situation, the result would be a recovery of a larger amount of damages, but without any certainty that those who suffered harm come forward to claim damages. Indeed, if unclaimed damages were to be passed to the Access to Justice Foundation, which is one of the proposals put forward in the Consultation paper, all that would be achieved is a windfall for that Foundation.

2.42 On the other hand, the CLA has previously noted that the record in the UK of a single follow-on representative consumer claim is not necessarily a strong endorsement of the effectiveness of the current regime and so there is scope for the Government to consider how it might make consumer redress more effective. We recognise that an opt-out representative regime for consumers is one (but not the only) option in this regard. However, if changes to the current regime are to be made (whether along the lines of an "opt out" model or otherwise), careful control needs to be exercised to ensure that the excesses of models in other jurisdictions are avoided. In particular, were the CAT to be given the power to certify an action to proceed on an "opt out" basis, the CLA would have particular concerns were there potential for the interests of the permitted representative class to conflict with the broader public policy objective of consumer redress. This would, in the CLA's view, militate against a certification regime of the type employed in the US jurisdiction.

2.43 In this regard, the opt-out system in the US, coupled with treble damages and special rules on costs, is designed to encourage and facilitate private enforcement of antitrust law. The US system is clearly aimed at deterrence and not only compensation. However, when considering actions that follow on from a decision by a regulator, there should be no need for further enforcement or deterrence in the UK and this should not be a consideration in designing the appropriate model for follow-on damages actions in the UK. Victims of cartels that have already been sanctioned by a UK competition authority or the European Commission should be entitled to obtain damages, but these should be directed at compensating loss suffered, rather than supplementing the public enforcement regime. It may be thought that there is still an argument in favour of further encouraging

private enforcement in relation to stand-alone damages actions. However, in the case of stand-alone actions, we would question the appropriateness of introducing an opt-out system as a means of fuelling such actions. An opt-out regime would bring about a significant change to the English legal system which could easily lead to unintended negative consequences (*e.g.*, creating a system that generates considerable income for law firms themselves rather than representing an effective means of redress to claimants and placing considerable pressure on defendants to settle unmeritorious claims because of the heightened litigation and costs exposure associated with opt-out cases), although these negative consequences could perhaps be mitigated through extremely careful judicial control and restrictions upon the type of body permitted to form the representative body. Victims of cartels that have not been penalised by a UK competition authority or the European Commission should still have a right to damages for the loss suffered, but we again believe that the current regime is adequate for this purpose.

2.44 One reason that section 47B CA98 has been used only once to date may be because of a failure to designate any representative bodies except Which?. This is something that could easily be remedied by adding additional bodies entitled to bring representative actions or by amending the regime to empower the CAT to approve representative bodies on a case-by-case basis. We would be supportive of such measures.

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

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

Question 13: Should collective actions be allowed in stand-alone as well as in follow-on cases?

2.45 As regards Questions 11 to 13, the first point to bear in mind is that stand-alone and follow-on collective actions are currently permitted in the UK by businesses and consumers for breaches of competition law. There is no distinction between the two, save in relation to claims under Section 47B CA98. Collective actions can take one of at least three forms. The first is proceedings in the High Court under a Group Litigation Order ("**GLO**"). Pursuant to this process, a group of claimants is allowed to make a claim under the supervision of the Court to ensure that all unnecessary duplication is avoided. Usually one law firm is appointed by the High Court to take the lead. Experience of GLO litigation appears to vary, and there is a view that, because of the involvement of the Court, the proceedings are somewhat over-formalistic and procedurally "heavy".

2.46 The second possibility is a representative action in the High Court. In principle this is a convenient way of proceeding and would be attractive to those representing claimants. However, the conditions under which representative actions are allowed are narrowly prescribed. In the recent *Emerald* case,[17] the Chancellor refused to allow the representative action to proceed on the basis that the interests of the claimants were not the same. This decision faithfully followed the case law, but the basis for the judge's conclusion that the interests of the claimants in that case were not the same is not altogether clear. The purpose of the rule is to ensure that the representative action can proceed on a proper basis with the principal parties being in a position to represent the interests of the rest. It is easy to see that, if the interests of the claimants conflicted, this could not be done satisfactorily. However, there is no suggestion in *Emerald* that the

[17] *Emerald Supplies Ltd v British Airways Plc* [2009] EWHC 741 (Ch).

interests of the claimants were in fact in conflict. It is simply that the particular circumstances of the claimants differed in some respects. There was no practical reason why the action should not go forward, as is demonstrated by the fact that the represented claimants were willing to be so represented.

2.47 Moreover, even where there are elements of conflict between the claimants, it is possible to deal with this through a process of agreement amongst them. This would effectively remove elements of conflict from the purview of the court. It would therefore be sensible to reconsider the conditions under which representative actions should be allowed to proceed.

2.48 While the High Court rejected an attempt to bring a representative action in *Emerald*, it is worth highlighting that the *Emerald* action is proceeding as a form of informal GLO/opt-in case where additional claimants are added to the proceedings as the case progresses and following initiation. This appears to show that there are ways to bring collective actions within the constraints of the existing system.

2.49 A third method for bringing representative actions is in fact used by claimants' lawyers and involves an agreement between all the claimants that only a small number, say one or two, will be involved as parties to the proceedings, but that all negotiations with the defendants will be conducted equally on behalf of all. This appears to enable representative actions to proceed on an informal basis.

2.50 In our view, both businesses and consumers alike should be entitled to bring collective actions to obtain compensation for breaches of competition law. One further change that the Government might consider introducing would be to extend section 47B opt-in

representative actions to SMEs as well as consumers. Such a form of representative action could be useful where SMEs experience difficulties similar to those faced by consumers as identified in the Consultation paper (*i.e.*, where individual losses are low and dispersed). From a practical perspective, attempts to define a class of SMEs to which the representative action would apply might prove difficult, resulting in satellite disputes concerning claimants' status as SMEs. However, this could potentially be circumvented by limiting designated representative bodies to those representing SME constituents or by providing that the CAT could approve such bodies on an *ad hoc* basis.

2.51 As already discussed above in response to Questions 9 and 10, the CLA does not consider that there are grounds for introducing any new form of collective action procedure in the case of stand-alone actions given that such cases are necessarily more speculative as they are not based on a pre-existing regulatory infringement finding (which, where necessary, has been test on appeal).

2.52 Para. 5.10 of the Consultation paper refers to a concern about claimants using a representative action as a vehicle for inappropriate information sharing that might be a breach of competition law. In practice, this risk arises with a whole variety of competition-law based actions, but is always dealt with by establishment of confidentiality rings to avoid the passing of competitively sensitive information between undertakings. Such confidentiality arrangements are arranged either under the auspices of the court or even prior to the involvement of any court by the law firms themselves. There can be no basis for suggesting that this risk should mean that businesses should not be able to benefit from collective actions for damages.

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

2.53 As explained above, we consider that there are insufficient grounds for introducing an opt-out system.

2.54 As for distinctions between "pure opt-in" and "pre-damages opt-in" actions, the current situation is that additional claimants can join an action after the initiation of the proceedings. What cannot, however, happen – and for good reasons – is that damages assessed by the Court cannot be based on the existence of unknown claimants. Having said this, settlements can be arranged so as to allow claimants to be brought into the case even after the end of the proceedings. In fact, this is what happened in the replica football kits case. It seems to us correct that this should be a matter of agreement between the parties rather than imposed on defendants. In the replica football kits case, Which? made efforts to reach out to potential claimants, to make them aware of the potential for redress, and to have them join the action. If an opt-out rule were introduced, a claimant firm might be disinclined to reach out to potential claimants, instead relying on a legal rule that future claimants would be somehow be entitled to a share in the damages.

Responses to Questions in Annex A

Question 15: What are your views on the proposed list of issues to be addressed at certification?

2.55 As explained above, we consider that there are insufficient grounds for introducing an opt-out system. However, in case the Government decides to introduce an opt-out system, we offer our comments on this Question.

2.56 Much of the litigation in the US is focused on class certification. We see some sense in all of the six criteria set out in para. 8.3. Put another way, if any one of those six criteria were not satisfied, it may well be that the court should not be prepared to certify the class.

2.57 However, the question as to whether there is sufficient commonality of issues among the claimants should be seen in light of what is said above about representative actions. We believe that the test for representative actions is currently too narrow and should instead be based on one that focuses on any conflict between the claimants that in the circumstances would actually be before the court.

2.58 As for the requirement that the representative action be a suitable means of resolving the common issues, this appears to be a matter of common sense, but should not lead to a practice that would stand in the way of representative actions.

2.59 As for sufficiency of funds to cover the costs of the defendants, should the case be unsuccessful, the court would clearly be alive to the fact that class actions can be expensive to defend but there may potentially be other ways of addressing this issue, such as ordering security for costs.

2.60 We also believe that a number of other issues would need to be addressed at the certification stage. These include the following:

(a) Whether a claim would most appropriately be brought on an opt-out basis or whether an opt-in action would be a more fair and efficient basis on which to bring the claim. The Consultation paper at para. 5.31 states that the CAT would

have discretion to consider this issue on certification, but this does not appear to be addressed within Annex A to the Consultation paper.

(b) Whether the claim is appropriately characterised as a competition claim, given the risk that the availability of special procedures in competition cases may lead to claimants seeking to shoe-horn other forms of claim into a competition case in order to take advantage of a specific competition collective action regime;

(c) Whether there are different categories of purchaser and whether sub-class representatives are required;

(d) Whether (as part of a preliminary merits test) there is a reasonable basis for a UK court taking jurisdiction over the claim; and

(e) How to deal with potential non-UK claimants; one option might be to require would-be members of the class resident outside England and Wales specifically to opt in.

Question 16: Should treble or other punitive damages continue to be prohibited in collective actions?

2.61 As explained above, we consider that there are insufficient grounds for introducing an opt-out system. However, in case the Government decides to introduce an opt-out system, we offer our comments on this Question.

2.62 In our view, there is no place for punitive damages in follow-on actions where fines have already been imposed on the relevant defendants. Punitive damages are not concerned

with redress. However, in the recent decision of the CAT in the *Cardiff Bus* case,[18] exemplary damages were awarded to reflect the disgraceful behaviour of the defendants. Without commenting on the appropriateness of the decision to award exemplary damages in that case, we feel on balance that it is better to avoid adopting exceptional rules for antitrust actions, relying instead on case law.[19]

2.63 It may also be noted that allowing treble or punitive damages would likely encourage unmeritorious claims and/or place undue pressure on defendants to settle. Indeed, the position would be all the worse in England where, unlike the US, interest rules already operate to inflate the award of damages by starting to run from the date on which the harm is suffered. Treble or punitive damages would also be taken into consideration by potential leniency applicants when deciding whether to apply for leniency and may persuade companies not to apply for leniency, thereby operating against the effective enforcement of EU/UK competition rules.

Question 17: Should the loser-pays rule be maintained for collective actions?

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

2.64 As explained above, we consider that there are insufficient grounds for introducing an opt-out system. However, in case the Government decides to introduce an opt-out system, we offer our comments on these Questions.

[18] *2 Travel Group PLC (In Liquidation) v Cardiff City Transport Services Limited* [2012] CAT 19.

[19] *See, e.g., Rookes v Barnard*, [1964] UKHL 1, the leading case on punitive damages.

2.65 We cannot identify valid reasons for concluding that the cost rules should be different for collective actions as compared with other actions. For follow-on actions, costs are unlikely to be awarded against claimants unless they refuse to accept an offer from the defendants that they fail to beat before the court. To suggest that, even in such circumstances, costs should not be awarded against claimants, would place defendants in an unfairly weak position and make settlement of the claim far less likely. It would therefore tend to lead to increased costs.

2.66 If the Government decides that the claimants' costs should be funded out of a damages fund, there appears to be no reason to suggest that this should not also apply to collective actions in competition cases.

2.67 We would also refer you back to our response to Question 15 where we explained that security for costs should be ordered where appropriate.

Question 19: Should contingency fees continue to be prohibited in collective action cases?

2.68 As explained above, we consider that there are insufficient grounds for introducing an opt-out system. However, in case the Government decides to introduce an opt-out system, we offer our comments on this Question.

2.69 We consider that there would a danger in combining contingency fees with an opt-out collective regime. Where the lawyers representing the claimants have a strong financial interest in the action, this can easily lead to conflicts of interest and further the lawyers may not necessarily act in the best interests of the claimants. Potential unwelcome

outcomes would include making settlements more difficult and lawyers seeking artificially to inflate the size of the class and the resulting damages.

Question 20: What are the relative merits of paying any unclaimed sums to a single specified body, when compared to the other options for distributing unclaimed sums?

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

2.70 As explained above, we consider that there are insufficient grounds for introducing an opt-out system. However, in case the Government decides to introduce an opt-out system, we offer our comments on these Questions.

2.71 Should unclaimed funds arise under an opt-out system – and the US system appears to indicate that we should expect a significant level of unclaimed funds – there is no clear way in which those funds can be used to achieve the purpose of collective redress. Cy-près is a solution of last resort and will certainly not guarantee that the surplus funds are put to any relevant and useful purpose. Simply paying the money into government funds, whether to the Treasury or to the Legal Aid Fund, would simply mean that the damages would take on the character of a fine. This would, in our view, certainly be entirely inappropriate in a follow-on action where fines had already been imposed.

2.72 It has been suggested that claimants sharing would have the effect that more claimants would come forward in the hope that they would receive a windfall. Of course, insofar as the incentive succeeded, the claimants would be disappointed. Again, if the purpose of collective actions is redress, there is no basis in principle for allowing the claimants to come forward to receive a windfall.

2.73 There is some basis for suggesting that surplus funds should simply be returned to the defendant. If the purpose of the collective action is redress and redress has been provided to the claimants who wish to make the claim, justice has been done and there seems to be no reason to deprive the defendant of any funds left over. Returning surplus funds to defendants would also make sure that incentives to settle are not skewed by the significant damages associated with opt-out regimes. Not allowing for surplus funds to be returned to defendants in an opt-out regime highlights that such a regime is not concerned so much with redress, but more with other policy objectives.

2.74 It is difficult to assess whether payment to the Access to Justice Foundation would be appropriate. This would depend on the way in which such funds were administered by the Foundation, which does not appear to be particularly clear.

Question 22: Do you agree that the ability to bring opt-out collective actions for breaches of competition law should be granted to private bodies, rather than granting it solely to the Competition Authority?

2.75 As explained above, we consider that there are insufficient grounds for introducing an opt-out system. However, in case the Government decides to introduce an opt-out system, we offer our comments on this Question.

2.76 It appears to be generally accepted that it would be undesirable to introduce a scheme such as the one that exists in the US, where antitrust class actions appear often to be used by law firms as vehicles for generating income for themselves rather than representing an effective means of redress to claimants. If opt-out collective actions were to be introduced, it seems to us that such actions should be brought only by representative bodies with strict safeguards. In our view, such actions should not be left to a UK

competition authority to pursue, not least as this would inevitably use up scarce resource and would likely reduce the level of public enforcement.

2.77 One key concern with opt-out regimes is that they can lead to law firms or other bodies having an interest in the use of surplus funds in a situation where such an interest would be inappropriate. This Question could, however, be addressed both by limiting such opt-out actions to follow-on damages cases brought by purely representative bodies (such as Which?), as well as having strict controls over the use of any surplus funds.

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

2.78 As explained above, we consider that there are insufficient grounds for introducing an opt-out system. However, in case the Government decides to introduce an opt-out system, we offer our comments on this Question.

2.79 If law firms and/or third party funders were entitled to bring such cases, we are concerned that, without appropriate safeguards, serious conflicts of issues could arise as between the law firms and/or third party funders and the victims of the cartel. See further our response to Question 19 above.

2.80 Another option considered in the Consultation paper entails entitling the Competition and Markets Authority to bring damages actions. However, we would have concerns in relation to a situation where the party acting for the victims of the cartel had at the same time investigated and adjudicated on the infringement in the first place. This could also reduce the incentives for companies to submit leniency applications.

2.81 Ultimately, if an opt-out regime were to be introduced, it seems to us that it would be preferable tightly to circumscribe the right to bring such actions to authorised representative bodies without any (significant) financial interest in the case and that such actions should only be brought in follow-on cases. This would permit cases to be conducted with the greatest efficiency, reduce the risks of unmeritorious claims being brought, and lessen the risks associated with claims being driven by class-action lawyers.

Question 24: Do you agree that ADR in competition private actions should be strongly encouraged but not made mandatory?

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

2.83 ADR is widely supported as a method of reducing the cost, disruption, and delay associated with resolution of disputes through litigation. When the European Commission published a Green Paper on the more extensive use of mediation in the European Union, it received 160 responses that were almost unanimously positive about the initiative.[20] This is not surprising in circumstances where one prominent provider of mediation services estimates that over 70% of mediations it organises result in settlement of the dispute.[21]

[20] "Commission Staff Working Paper: Annex to the proposal for a directive of the European Parliament and of the Council on certain aspects of mediation in civil and commercial matters", COM(2004)718 final, available at: http://www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/sec/2004/1314/COM_SEC(2004)1314_EN.pdf.

[21] Centre for Effective Dispute Resolution: *see* http://www.cedr.com/solve/mediation/.

2.84 ADR is also particularly useful for the resolution of disputes between consumers and businesses. A 2009 study for the European Commission[22] identified that there were some 750 ADR schemes in the European Union that were relevant for business-to-consumer disputes collectively handling approximately half a million cases per year. The study's authors concluded that ADR schemes "*are indeed a low-cost and quick alternative for consumers for settling of disputes with businesses*" since most schemes incurred costs of less than EUR 50 for the consumer and provided an outcome within 90 days.

2.85 As the Consultation paper recognises (para. 6.3), it has long been UK Government policy to promote the use of ADR throughout the court system wherever it is feasible to use it and so it has become a key feature of litigation in this country. Since at least the introduction of the CPRs in 1998, following the landmark Access to Justice Report by Lord Woolf in 1996,[23] the use of ADR and mediation in particular has been actively encouraged by both legislators and judges.

2.86 For example:

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

[22] "Study on the use of Alternative Dispute Resolution in the European Union" (Civic Consulting of the Consumer Policy Evaluation Consortium, 16 October 2009), available at: http://ec.europa.eu/consumers/redress_cons/adr_study.pdf.

[23] "Access to Justice Final Report", by The Right Honourable the Lord Woolf, Master of the Rolls, July 1996, available at: http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/index.htm.

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

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

(d) Provisions in the Commercial Court Guide require parties to provide information about what steps they have taken to resolve the dispute by ADR or, alternatively, why ADR would not be appropriate. The Commercial Court can also order use of an ADR process or, more typically, it may order a stay to allow the parties space to try to agree the use of an ADR process. It can, by agreement, undertake an Early Neutral Evaluation itself, although we are not aware of this option ever having been used in a competition private action. The enthusiasm of the Commercial Court for ADR is of great importance in this context because, alongside the Chancery Division, it is one of the only two courts outside the CAT that can hear competition private actions.

(e) A series of judicial decisions have confirmed that it can be appropriate to impose costs sanctions for an unreasonable failure to participate in ADR processes.[24]

(f) As noted in the Consultation paper (para. 6.9), the CAT can also encourage use of ADR. Rule 44(3) of the CAT Rules 2003 (SI 2003/1372) ("**CAT Rules**") gives the CAT the power to "*encourage and facilitate the use of an alternative dispute resolution procedure if the Tribunal considers that appropriate*."[25] The CAT has used those powers in a number of cases.

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

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

2.89 In fact, it is already the case that most competition private actions are resolved by way of negotiation and/or mediation. Very few claims are litigated all the way to trial. This is the same as in other forms of commercial litigation. If there is an issue in relation to the use of ADR in competition private actions, it is not so much that it is not used but that it is typically only used after proceedings have been issued and often only after a good deal of time and cost has already been incurred in the proceedings. We address the reasons

[24] *See*, for example, *Dunnett v Railtrack plc* [2002] EWCA Civ 303; [2002] 1 W.L.R. 2434 and subsequent cases applying it.

[25] CAT Rules 2003 (SI 2003/1372), available at: http://www.catribunal.org.uk/240/Rules-and-Guidance.html.

for this further in our response to Question 30 in explaining why we believe there are very good reasons for providing additional incentives to offer a scheme of redress.

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

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

(a) Where the form of ADR is similar to mediation, which depends on the parties reaching a voluntary agreement, rather than having a solution imposed upon them by a third party, there is little point in compelling the involvement of the parties because it is unlikely to result in any resolution of the dispute. Parties who cannot even reach agreement on the use of an ADR procedure are unlikely to be able agree on settlement terms. Compelling parties to undertake ADR before they are willing to do so voluntarily may even obstruct settlement by making one or both parties less willing to try it again later at a more appropriate time.

(b) Parties should be free to insist on their right of access to the courts. It is a fundamental right of parties, protected *inter alia* by Article 6 of the European Convention of Human Rights ("**ECHR**"), to have a "*fair hearing*" before "*an independent and impartial tribunal*." ADR would not ordinarily satisfy those criteria as it is about compromise rather than vindication of rights; and

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

2.92 Moreover, we would oppose any attempt to mandate ADR pre-action in the specific circumstances of competition private actions for the same reasons that we would oppose a pre-action protocol, as discussed below in relation to Question 25.

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

Question 25: Should a pre-action protocol be introduced for (a) the proposed new fast track regime, (b) collective actions and/or (c) all cases in the CAT?

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

2.95 The interaction of Articles 2, 5(3) and 6(1) of the Brussels Regulation create a situation where there are typically many different national courts that could entirely properly have

jurisdiction to determine the loss (if any) suffered by any given purchaser of allegedly cartelised goods. There is, accordingly, a choice of courts available.

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

2.97 If the purchaser must give the alleged cartelist prior notice of a claim, the alleged cartelist has the opportunity to pre-empt the claim by issuing its own proceedings in a court of its choice for a declaration that it has no liability toward the claimant. This is what has become known as the "Italian torpedo" and is what happened in the so-called synthetic rubber cartel case[26], where we believe that ENI acted precisely because it received a letter before action from a purchaser.

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

2.99 This issue will be particularly acute with large-scale cross-border damages actions, such as those that are likely to be brought by way of the new opt-out collective action, but it may still arise even in relation to cases that may be amenable to the proposed fast-track

[26] Case COMP/F/38.638 – Butadiene Rubber and Emulsion Styrene Butadiene Rubber, available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/38638/38638_826_1.pdf.

route. Indeed, the defendants' desire to avoid the fast-track may make it particularly likely for an Italian torpedo to be used as a tactical weapon.

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

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

2.102 With that in mind, we would propose a slightly different form of pre-action protocol that, strictly speaking, could be considered a "post-issue protocol". This would strongly encourage all parties to go through the protocol process, at the latest before the time for preparation of defences, with encouragement to agree stays of the proceedings for that purpose insofar as it may be necessary. We note that this is similar to the approach in existing pre-action protocols, where parties issue proceedings before complying with the protocol due to the imminent expiry of a limitation period. As with more typical pre-action protocols, there could be cost sanctions for refusal to comply.

2.103 It may be that there is no real need for a pre-action or even post-issue protocol because the approach just described is what tends to happen in practice anyway. Claimants and defendants tend to engage in discussions directed towards settlement and/or narrowing the issues in dispute either immediately following the issue of proceedings and even before service or, alternatively, following the determination of jurisdictional challenges.

Question 26: Should the CAT rules governing formal settlement offers be amended?

2.104 Yes, the CAT rules governing formal settlement offers need amending.

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

(a) The rule only sets out a process for formal offers by defendants and not by claimants;

(b) The rule requires a cash payment to be made into court by the defendant. The equivalent High Court rule long ago removed the requirement actually to make a payment in order for a formal offer to be valid;

(c) There is no explanation of exactly how a payment into court is to be made. It is said that the details are to be found in a practice direction, but there appears to be no such practice direction;

(d) The defendant cannot withdraw or reduce the offer once made other than with the permission of the Registrar, the criteria for which grant of permission are not set out anywhere;

(e) Rule 43(5) permits the claimant to accept the offer at any point up to 14 days before the final hearing and rule 43(6) establishes a default rule that the claimant will be entitled to its costs up to the date of acceptance. This is an especially significant deterrent to the making of formal offers by defendants under rule 43 because it requires a defendant to give an open offer to pay all the claimants costs up to the point 14 days before trial, even if the claimant should have accepted the

offer immediately at a very early stage in the litigation. Conversely, it gives claimants no incentive to accept an offer prior to the point 14 days before trial;

(f) There is very little benefit to a defendant making an offer under rule 43 because the consequences of the claimant failing to beat the offer are only that it will be required to pay the defendant's costs from the last date on which it was permitted to accept the offer, which would be 14 days before trial. Further, while the Tribunal "may" order those costs to be paid on an indemnity basis and/or subject to penal interest, it is under no obligation to do so; and

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

2.106 Nevertheless, rule 43 gives little incentive to either claimants or defendants to make offers to settle.

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

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

acknowledge that the claimant was entitled to pursue that defendant for the whole of the loss caused by the cartel.

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

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

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

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

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

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

should be borne only by the defendants who failed to make offers or whose offers were beaten.

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

(a) Percentage overcharge suffered;

(b) Proportion of overcharge passed through;

(c) Volume of purchases affected; and

(d) Pre-judgment interest rate to be applied.

2.116 Such an approach would give individual defendants the opportunity to secure some degree of costs protection without in any way undermining the principle of joint and several liability, nor shifting the risk on allocation of losses between defendants to the claimant(s). It would also increase incentives to settle by prompting individual defendants to make more generous offers in order to avoid being left with a disproportionate share of the claimant(s)'s costs and, in turn, by probably leaving the claimant(s) facing higher offers from all defendants.

Question 27: The Government would be interested to hear of whether, should the reforms in this consultation be carried out, your organisation would intend to establish any initiatives that might facilitate the provision of ADR for disputes relating to competition law.

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

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

2.118 As explained above, we consider that there are insufficient grounds for introducing an opt-out system. However, should the Government choose to introduce an opt-out system, we do not have any strong opinions on this issue. The Consultation paper may be correct in its view that it would be possible to generate a collective action to be settled in all or most cases where there was a desire to reach a collective settlement. It would also commonly be possible for the parties to resort to the Dutch courts to give effect to their settlement if they wished to reach a collective settlement.

2.119 The same issue arises in relation to any opt-out collective settlement, as in relation to any opt-out collective action: namely, its enforceability outside the UK.

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

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

Voluntary redress schemes

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

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

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

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

(b) It is not necessarily a task that falls within the expertise of the competition authority. Competition authorities do not currently get involved in the

quantification of losses at all, whereas there are many other professionals who do it every day. While the competition authority's assessment could be expected to be impartial, the approach required could well run the risk of leading to erroneously high or low figures;

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

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

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

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

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

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

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

(d) Power of consumer/representative organisations to be involved and make submissions;

(e) Flexibility on defendants to offer non-monetary redress;

(f) Supervision/administration of the process by a renowned ADR provider such as the CEDR.;

(g) Processing of claims by an independent claims handler; and

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

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

2.127 It is envisaged that "certification" by the competition authority would give rise to a modest reduction in fines (see response to Question 30) and costs consequences akin to those under Part 36 of the CPR if purchasers chose not to accept the resulting offers but failed to beat them in subsequent litigation.

Imposition of redress schemes

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

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

2.130 A redress scheme imposed by a competition authority would not be voluntary in any sense. At the extreme, it could simply amount to a deprivation of property without

proper judicial controls (which would no doubt raise issues under, *inter alia*, Article 1 of Protocol 1 to the ECHR). At best, it would amount to a partial deprivation of rights of defence without any compelling justification. We note, in this regard, that arguments could be made for similar powers in relation to other losses that tend to affect many people to a modest extent: for example, product liability, public nuisance, and other "mass torts".

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

2.132 It has been suggested that the power to compel participation in a redress scheme might only be used where most of the participants in a cartel are willing to take part in a redress scheme and only one or two are not. While we can see some superficial merit in that situation, in that it is clearly preferable to have all participants involved, we would suggest that any refusenik will come under considerable public pressure to participate and it will also face a threat of legal action avoided by all the others. One would hope that,

over time, those factors would discourage refusals to participate. A reduction in fines would also help in that regard (see answer to next Question 30).

Question 30: Should the extent to which a company has made redress be taken into account by the competition authorities when determining what level of fine to impose?

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

2.134 A reduction in fines is justified for three reasons:

(a) The threat of litigation will not necessarily be enough to incentivise participation in a voluntary redress scheme. Participation in a voluntary redress scheme will entail (alleged) cartelists making various sacrifices which they might quite reasonably be unprepared to do without some clear financial benefit. For example:

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

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

(iii) A company submitting to a voluntary redress scheme would be accepting a probably less rigorous testing of purchasers' claims;

(iv) If the model adopted were similar to that proposed by the Confederation of British Industry ("**CBI**"), which would not be binding on the cartelist but only binding on purchasers who accept the result of the process, a company submitting to the scheme would not be getting any certainty and might be wasting a large amount of costs for little gain; and

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

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

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

(c) There is a benefit in terms of deterrence. The Consultation paper and impact assessment recognise that greater and quicker compensation will add to deterrence. If the redress scheme speeds up the process of compensation and avoids procedural obstacles to it, there is likely to be a public deterrence benefit.

Such a benefit or, conversely, the reduced need for the penalty to provide deterrence is something that ought properly to be recognised in setting fines.

2.135 A modest reduction of, say, 10% of the fine would not be out of line with the approach that the OFT has taken from time to time in relation to, for example, compliance policies. It would also be easy to administer.

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

Question 31: The Government seeks your views on whether and how an extended role for private actions would positively complement current public enforcement

2.137 It is generally accepted that antitrust enforcement involves three distinct tasks: (a) clarifying and developing the content of the prohibitions against anti-competitive agreements and conduct; (b) preventing the infringement of the prohibitions through punishment and deterrence; and (c) compensating the victims of infringements.[27]

2.138 As regards the first task, clarification of Articles 101 and 102 of the Treaty on the Functioning of the European Union and their UK equivalents have mostly been carried

[27] *See*, *e.g.*, W.P.J Willis, "The Relationship between Public Antitrust Enforcement and Private Actions for Damages" (March 2009), 32 *World Competition*, pp. 3-26.

out by public agencies and the courts (on appeal of public agency decisions)[28] and private actions for damages, certainly as far as concerns cartels, have not played any meaningful role in this regard. While stand-alone actions might in principle be used to clarify and develop the content of antitrust infringements, such actions are virtually non-existent (at least outside dominance cases). Follow-on actions, on the other hand, are unlikely to add much to clarification and development of antitrust rules provided by public agencies.

2.139 In contrast, private actions for damages could, in theory, contribute to deterrence, with companies taking into account the costs of damages potentially recoverable by third parties that have suffered loss when they decide whether to observe antitrust rules. In reality, as noted by Advocate General in *Pfledeirer* (relating to a German cartel case):[29] "*the role of the Commission and national competition authorities is, in my view, of far greater importance than private actions for damages in ensuring compliance with Articles 101 and 102 TFEU. Indeed so reduced is the current role of private actions for damages in that regard that I would hesitate in overly using the term 'private enforcement'*" (para. 40). Given the absence of many successful stand-alone actions in the UK, it follows that the role of private enforcement in deterring antitrust infringements currently depends chiefly on follow-on actions. The additional costs of the damages should, in fact, be taken into account by potential infringers when evaluating benefits of participating in a cartel, but the potential infringer is also aware that such additional costs

[28] *See* "Commission Notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases", available at: http://europa.eu/legislation_summaries/competition/firms/l26112_en.htm.

[29] C-360/09, *Pfleiderer AG v Bundeskartellamt*.

need only be paid where the cartel is first detected by, or revealed to, the antitrust authority.

2.140 Partly in light of these circumstances, it has been convincingly argued that public enforcement is superior for achieving optimal deterrence. The antitrust authority can increase the level of fines until the level is deemed sufficient to discourage potential infringers.[30]

2.141 Moreover, both the European Commission[31] and Court of Justice[32] appear to consider that the deterrent function of private actions is modest. In reality, the lack of stand-alone actions demonstrates that private enforcement does not play any meaningful role in the deterrence of competition law infringements.

2.142 Based on the above considerations, it seems that the only task pursued by private enforcement in the current system is that of generating compensation of the victims for the loss suffered as a consequence of antitrust violations. Under the current legislative framework, private enforcement does not complement public enforcement. Rather,

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[30] *See*, K.G. Elzinga and W. Breit, *The Antitrust Penalties: A Study in Law and Economics*, 1976, p. 95.

[31] In its White Paper on damages actions for breach of the EC antitrust rules, the European Commission stated that action for damages may "*produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules*" (n°1.2). Significantly, there is nevertheless less emphasis in the White Paper on the deterrence effect of private actions as compared with the earlier Green Paper – Damages actions for breach of the EC antitrust rules, where the Commission stated that "*Damages actions for infringement of antitrust law serves […] to ensure the full effectiveness of the antitrust rules of the Treaty by discouraging anti-competitive behaviour, thus contributing significantly to the maintenance of effective competition in the Community (deterrence).*" This shift in emphasis was no doubt a result of the public consultation on the Green Paper.

[32] In C-453/99, Courage Ltd v Bernard Crehan and Bernard Crehan v Courage Ltd and Others, the Court of Justice stated that "*Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition. From that point of view, actions for damages before the national courts can make a significant contribution to the maintenance of effective competition in the Community*" (para. 27).

public and private enforcement have different roles and protect different interests. Public enforcement is aimed at preventing antitrust infringements, whereas private enforcement has the task of compensating the victims.

2.143 A second important observation is that private enforcement can not – and should not in our view – be instrumental in public enforcement achieving its main task (deterrence), but the opposite is not the case. Indeed, it is widely acknowledged that public enforcement is indispensable for enabling victims of antitrust infringements to become aware of antitrust infringements and/or to demonstrate violations of the competition rules. In this regard, every measure that has a positive effect on public enforcement will automatically benefit private enforcement. It is, therefore, desirable that the Government seeks to ensure a world-class public enforcement regime in the UK, allocating sufficient resources and adequately regulating the activity of the new Competition and Markets Authority.

2.144 In conclusion, we believe that the best approach is to regulate public and private enforcement in a way that they do not negatively interfere with each other, taking into account that, under the current legislative frameworks, the interests protected (deterrence and compensation) deserve and require the same amount of protection. This goal should be pursued by avoiding imposition of special rules that either restrict or widen the right of the victims of antitrust infringements to be compensated.

Question 32: Do you agree that some leniency documents should be protected from disclosure, and if so what sort of documents do you believe should be protected?

2.145 The European Commission and national competition authorities insist that disclosure of leniency documents could compromise the effectiveness of leniency programmes.

However, competition authorities have not supplied much evidence to demonstrate the harmful effect of disclosure. In that regard, it has been recently noted that: "*despite the growing importance of leniency programs, the actual operation of these programs is somewhat opaque. […] Outside the enforcement agencies themselves, however, not much is known about the dynamics and timing of the race* [to expose the cartel in exchange of leniency]"[33].

2.146 While hard evidence of the impact of disclosure on leniency applications has not been presented, on 23 May 2012, the European Competition Network ("**ECN**") issued a resolution entitled "Protection of leniency material in the context of civil damages actions"[34], in which it was stated that: "*The experience of the [competition authorities] shows that when deciding whether or not to cooperate with [competition authorities] under a leniency programme, potential leniency applicants consider as an important factor the impact of such cooperation on their position in civil proceedings as compared with the situation where they decide not to cooperate with [competition authorities]*". This statement does suggest evidence of the negative impact of disclosure of leniency documents. However, the debate would no doubt be helped if competition authorities presented more evidence with a view finding the right balance between the protection of the effectiveness of leniency programmes and the possibility for victims to recover damages suffered from antitrust infringements. This would also assist national courts

[33] C.R. Leslie, "Editorial – Antitrust Leniency Programmes", *The Competition Law Review* 7, p. 176.

[34] "Protection of leniency material in the context of civil damages actions" available at: http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf.

when conducting the weighing exercise required by the European Court of Justice in *Pfleiderer*.[35]

2.147 The debate about disclosure of leniency documents may be considered from two different angles: (a) the incentive to submit a leniency application in the first place; and (b) the incentive to supply competition authorities with all possible details/documents concerning the antitrust infringement.

2.148 There are several arguments supporting the view that disclosure of leniency documents does not have any significant effect on the incentive of submitting leniency application.

2.149 The first argument is that legislative framework is such that there has never been absolute protection of all leniency documents. As a result, it has been always uncertain as to the extent to which such documents would be given protection. The latest decision of the General Court in relation to the so-called Transparency Directive (Regulation No. 1049/2001), which was enacted more than 10 years ago, is interesting in this regard. In *EnBW,*[36] the General Court held:

> "*The third indent of Article 4(2) of Regulation No 1049/2001 therefore applies, in the Commission's submission, after particular proceedings have been completed. Given that, in proceedings against cartels, the Commission is reliant on the cooperation of the undertakings concerned, it submits that, if the documents that those undertakings provides it with were not kept confidential, the undertakings*

[35] C-360/09, *Pfleiderer AG v. Commission*, 14 June 2011.

[36] T-344/08, *EnBW Energie Baden-Württemberg AG v. Commission*, 22 May 2012.

would have less incentive to file leniency applications and would also restrict themselves to the bare minimum when providing all other information, in particular as regards requests for information and inspections. The protection of confidentiality is thus a prerequisite for the effective prosecution of infringements of competition law and, by the same token, an essential component of the Commission's competition policy. However, acceptance of the interpretation proposed by the Commission would amount to permitting the latter to exclude its entire activity in the area of competition from the application of Regulation No 1049/2001, without any limit in time, merely by reference to a possible future adverse impact on its leniency programme. Account should be taken, in that regard, of the fact that the consequences which the Commission fears for its leniency programme depend on a number of uncertain factors, including, in particular, the use that the parties prejudiced by a cartel will make of the documents obtained, the success of any actions which they may bring for damages, the amounts which will be awarded them by the national courts and the way in which undertakings participating in cartels will react in future. Such a broad interpretation of the concept of 'investigation' is incompatible with the principle that, on account of the purpose of Regulation No 1049/2001, as stated in recital 4, namely, 'to give the fullest possible effect to the right of public access to documents', the exceptions laid down in Article 4 of that regulation must be interpreted and applied strictly (see the case-law cited in paragraph 41 above). It must be stressed, in that regard, that nothing in Regulation No 1049/2001 gives grounds for assuming that EU competition policy should enjoy, in the application

of that regulation, treatment different from other EU policies. There is thus no reason to interpret the concept of the 'purpose of investigations' differently in the context of competition policy than in other EU policies".

This shows that the European Commission cannot apply a blanket ban on access to leniency documents by reference to general concerns regarding the impact disclosure would have on its leniency regime.

2.150 Other recent and relevant judgments are those by the Court of Justice in *Pfleiderer*[37] and the English High Court in *National Grid*[38], which have equally confirmed that there is no absolute protection of leniency documents. Also, the US Courts have handed down several (conflicting) decisions on the discoverability of leniency documents submitted to the European Commission.

2.151 Accordingly, since adoption of the EU's leniency regime, a prudent advisor would have explained to any potential leniency applicant that the risk of disclosure of the leniency documents and their use in follow-on damages actions could not be excluded. Notwithstanding this, leniency applicants do not appear to have been discouraged from requesting access to leniency programmes.

2.152 A second argument that seems to suggest that disclosure of leniency documents may not have a substantial impact on the decision to submit a leniency application relates to leniency applications by employees. There is a danger that an employee may seek

[37] C-360/09, *Pfleiderer AG v. Commission*, 14 June 2011.

[38] *National Grid Electricity Transmission plc v ABB Ltd and others* [2012] EWHC 869 (Ch).

leniency in advance of his/her company and this can lead to "*a race for corporate leniency between the principals of the members of the cartel*."[39] Moreover, "*[t]he real value and measure of the individual leniency program is not in the number of individual applications we receive, but in the number of corporate applications it generates*."[40] The race between companies and their employees is unlikely to be influenced by possible future disclosure of leniency documents in future damages actions.

2.153 A third argument can be found in *National Grid*[41], where it is stated that:

> "*a decision not to go to the Commission would not have given ABB any guarantee of protection from civil liability since if any of the other participants had informed the Commission the cartel would have been exposed. Then ABB would similarly have been liable to civil claims but in addition would have faced a very substantial fine. Of course, any disincentive to seek leniency because of potential disclosure in civil litigation might have dissuaded all the other participants from approaching the Commission, but this would have been a high-risk gamble for ABB to take*" (para. 37).

The severe monetary fines imposed by competition authorities (not to mention other sanctions such as director disqualification and criminal liability) remain the principal driver towards submission of leniency applications.

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[39] *See* F. Thépot, "Leniency and Individual Liability: Opening the Black Box of the Cartel" (2011) *The Competition Law Review* 7 , p.237).

[40] *See* SD Hammond, "Cornerstones of an Effective Leniency Program", presented before the ICN Workshop on Leniency Programs, Sydney, Australia November 22-23, 2004 and available at: http://www.justice.gov/atr/public/speeches/206611.htm.

[41] *National Grid Electricity Transmission plc v ABB Ltd and others* [2012] EWHC 869 (Ch).

2.154 While potential future disclosure of leniency documents may not necessarily have a significant impact on the decision to submit a leniency application in the first place, it seems more likely that disclosure of leniency documents may have an impact on the extent of information and evidence disclosed to the antitrust authority. This is implicitly confirmed by the following statement by Mr. Alexander Italianer:

> "*Immunity leniency programmes are of course only useful to the extent that the cooperation provided by applicants actually contributes to proving the violation. It is natural for applicants – and this is a trend we have detected – that applicants want to provide enough to qualify, but also to limit their exposure as much as possible, if only to minimise follow-on damages claims*".[42]

2.155 A regulation preventing the victims of antitrust infringement from accessing all leniency documents (and possibly other documents, including the confidential version of the final decision) is likely to have a certain negative effect on private enforcement.[43] In contrast, there does not seem to be any strong evidence that disclosure would have any substantial

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[42] *See* "Trends in Cartel Enforcement and Policy", ICN Annual Conference 2010, Istanbul, Cartel Working Group Session, 29 April 2010, p. 3, available at: http://ec.europa.eu/competition/speeches/text/sp2010_02_en.pdf.

[43] Mr. Joaquìn Almunia recently declared that: "*We are committed to protecting our leniency policy following last year's Pfleiderer judgment. This is a matter of common concern for Europe's public enforcers. Just a few weeks ago, the heads of the agencies associated in the European Competition Network adopted a joint resolution on the protection of leniency material in the context of damage actions. But we are seeking a more general solution. I intend to propose legislation later this year that will strike the right balance between the protection of leniency programmes and the victims' rights to obtain compensation*" (Speech on *Antitrust enforcement: Challenges old and new*, 19th International Competition Law Forum, St. Gallen, 8 June 2012, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/12/428). This statement confirms what had been already announced in the Annex to the Commission Work Programme 2012, available at: http://ec.europa.eu/atwork/programmes/docs/cwp2012_annex_en.pdf: "*The objective of this legislative initiative would be to ensure effective damages actions before national courts for breaches of EU antitrust rules and to clarify the interrelation of such private actions with public enforcement by the Commission and the national competition authorities, notably as regards the protection of leniency programmes, in order to preserve the central role of public enforcement in the EU.*"(page 3, n. 7).

impact on the decision to submit leniency applications in the first place. Since, however, leniency applicants may limit what they say in corporate leniency statements if there is a risk of such statements being disclosed, it would appear sensible to us to introduce legislation protecting corporate leniency statements from disclosure (including where such statements are quoted in the authority's decision), although protection should not extend to pre-existing documents already in existence at the time of drawing up the corporate leniency statement.[44] This would help to ensure the effective enforcement of EU/UK antitrust rules, while at the same time not unnecessarily hampering the bringing of private damages actions. Indeed, providing access to leniency documents may reduce litigation costs associated with complex economic analysis relating to causation and quantum, as well as reducing error costs, especially when the public version of the decision dos not contain all elements necessary to establish causation and quantum.[45]

Q. 33 Do you agree that whistleblowers should be protected from joint and several liability, and to what degree, if it all, do you think this should be extended to other leniency recipients?

2.156 In some jurisdictions, there are already exceptions to the rule that imposes joint and several liability over all members of the cartel.

[44] A rule protecting pre-existing documents could "*allow the applicant to use the leniency program in order to prevent the disclosure of these documents*". *See, e.g.*, the European Commission's Green Paper on private damages action, para. 233.

[45] *See* Final Report for the European Commission, "Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios", 21 December 2007, pp. 500-501. Disclosure of leniency documents may reduce the strategic use of leniency applications against competitors. *See*, D. Sokol, "Cartels, Corporate Compliance and What Practitioners Really Think About Enforcement" (2012) 78 *Antitrust Law Journal*, p. 212: "*Nearly all practitioners stated that the strategic use of leniency (strategic in the sense that the leniency program may be used to punish rivals and in some cases even to help enforce collusion) is a reality and the only issue was the frequency and severity of the strategic gaming. Over half of the interviewers found that strategic leniency was significant.*"

2.157 The most notable exception is the US where the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 provides that, in civil actions alleging violations of the Sherman Act – such as price fixing – Department of Justice leniency applicants are only liable for actual damages caused by their conduct, as opposed to treble damages and joint and several liability, if the leniency applicants provide "*satisfactory cooperation*" to the plaintiffs.[46] Other members of the cartel remain jointly and severally liable, but it is noteworthy that the US antitrust law contains a "no-contribution rule" intended to promote settlements between cartel members and victims.[47]

2.158 Legislation has also been recently introduced in Hungary which means that successful immunity applicants are not jointly and severally liable provided the claimants can obtain full redress from the other cartel participants. The relevant provisions read as follows:

> "*Any person to which immunity from fine was granted under Article 78/A may refuse to pay damages for the harm caused by his conduct infringing Article 11 of this Act or Article 81 of the EC Treaty until the claim can be recovered from any other person responsible for causing harm by the same infringement. This rule is without prejudice to the possibility of bringing a joint action against persons causing the harm. Lawsuits initiated to enforce claims against persons*

[46] Note what is said in the "Report to Congressional Committees of the United States Government Accountability Office Stakeholder Views on Impact of 2004 Antitrust Reform Are Mixed, but Support Whistleblower Protection", July 2011, available at http://www.gao.gov/assets/330/321794.pdf: "*Our interviews with defense attorneys representing 18 leniency applicants who came forward to the Antitrust Division both before and after ACPERA indicate ACPERA's offer of relief from civil damages had a slight positive effect on leniency applicants' decisions to apply for leniency, though the threat of jail time and corporate fines were the most motivating factors both before and after ACPERA's enactment.*"

[47] *See* Easterbrook, Landes & Poster, "Contribution Among Antitrust Defendants: a Legal and Economic Analysis" (1980) 23 *Journal of Law and Economics* 331, p.365: "*A rule of no contribution creates competition among defendants to settle rather than litigate. Each defendant dreads being the last to settle, because every time one defendant settles the expected liability of the remaining increases.*"

responsible for harm to which immunity from fine was granted shall be stayed until the date on which the judgment made in the administrative lawsuit initiated upon request for a review of the decision of the Hungarian Competition Authority establishing an infringement becomes legally binding".[48]

2.159 Reform has also been discussed at European level, with the European Commission proposing removal of joint and several liability in its Green Paper,[49] although this was strongly opposed by the European Parliament.[50]

2.160 Other proposals discussed by the OFT have included removal of joint and several liability of the immunity applicant, provided the other cartelists are solvent or giving courts the power to allow the immunity applicant to seek contributions of up to 100% from non-leniency recipients.[51]

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[48] *See* C. I. Nagy, "The New Hungarian Rules on Damages Caused by Horizontal Hardcore Cartels: Presumed Price Increase and Limited Protection for Whistleblowers – An Analytical Introduction", (2011) 32 *European Competition Law Review* 2, p. 66.

[49] *See* European Commission staff working paper accompanying the Green Paper available at: http://ec.europa.eu/competition/antitrust/actionsdamages/sp_en.pdf: "*Damages claims are tort claims and under general rules of civil liability undertakings which are parties to anti-competitive agreements will be liable for the whole of the damage caused by these agreements. The tortfeasors will be jointly and severally liable for the damage caused by their actions. A possible policy solution would be to limit the liability of the leniency applicant to the share of the damage corresponding to his share in the cartelized market*" (para. 236).

[50] For a detailed discussion of the debate at the European Level about the proposal to remove joint and several liability, *see* C. Cauffman, "The Interaction of Leniency Programmes and Actions for Damages", in 7 *The Competition Law Review* 2, pp. 210-213.

[51] OFT, "Private actions in competition law: effective redress for consumers and business, Discussion Paper", April 2007, available at: http://www.oft.gov.uk/shared_oft/reports/comp_policy/oft916.pdf. ("*The first is the complete removal of joint and several liability for the immunity recipient. We consider that, in order to strike a proper balance between the public and private interests involved, it may be appropriate only for the immunity recipient to benefit from the removal of joint and several liability. The position of other leniency recipients would be unaffected. The second would be to allow claimants to bring an action against an immunity recipient under normal principles of joint and several liability, whilst empowering the court to allow the immunity recipient, in turn, to seek contributions of up to 100 per cent from non-leniency recipients.*" (para. 7.18).

2.161 The main criticism levelled at the proposal to remove joint and several liability of the immunity applicant is the risk that victims of cartels may be unable to obtain full compensation if the other cartel members have become insolvent (at least in those cases where the victims have not purchased the majority of the cartelised products from the immunity applicant). However, it seems that this scenario is rather remote, especially where removal of joint and several liability is limited to the first immunity applicant. By contrast, a rule removing joint and several liability from the immunity applicant could provide an incentive to submit leniency applications, not least given that the potential immunity applicant may be in a better position to assess the total anticipated costs associated with such an application (*i.e.*, civil damages would be limited to the harm caused through the cartelised products and/or services sold by the applicant).

2.162 Removal of joint and several liability should not, however, be extended to other leniency applicants. First, giving only the immunity applicant this benefit would increase the difference with other members of the conspiracy and, in turn, render the cartel more unstable and liable to detection. Second, extending this benefit to all leniency applicants could substantially increase the possibility that victims will not be compensated given that those cartel participants deciding not to cooperate may become insolvent.

Question 34: The Government seeks your views on whether there are measures, other than protecting leniency documents or removing joint and several liability, where action should be taken to protect the public enforcement regime.

2.163 All rules aimed at facilitating private damages actions and ability of victims to obtain redress (*i.e.*, presumption of loss, denial of passing-on defence) have the potential negatively to impact on public enforcement.

2.164 As submitted above, it does not seem advisable to prevent victims from being able to recover damages through introducing a special rule imposing an absolute ban on access to leniency documents. Equally, however, it does not seem justifiable to place victims of antitrust infringements in a better position than victims of other types of torts.

2.165 Every rule that renders antitrust damages actions easier as compared with other tort actions will likely discourage potential leniency applicants, whereas it is doubtful whether consumers have serious concerns based on the current absence of successful damages actions.[52] As has been noted:

> "*[t]he losses from antitrust violations are widely dispersed, do not represent the disappointment of strongly held expectations, and can in many cases be adapted to without severe dislocation in the lives of the persons affected. Moreover, existing welfare laws, unemployment compensation, bankruptcy laws, and a number of provisions in the tax laws provide relief from any catastrophic losses, including those that might result from an antitrust violation*".[53]

2.166 Accordingly, the best way to protect the efficacy of the public enforcement regime is to avoid any measures that artificially increase the number of private actions for damages and risk deterring submission of leniency applications.

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[52] A convincing explanation is provided by W.P.J. Willis, "Should Private Antitrust Enforcement Be Encouraged in Europe?" (September 2003) 26 *World Competition* 3, pp. 473-488.

[53] W.F. Schwarz, *Private Enforcement of the Antitrust Laws: An Economic Critique* (American Enterprise Institute 1981) at p. 32.

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The CLA would be happy to arrange a meeting with BIS to discuss in more detail any of our comments provided above.