



Department of Business, Innovation and Skills: “Private actions in competition law: a consultation on options for reform”.

Consultation response from the ESRC Centre for Competition Policy

University of East Anglia, Norwich Research Park, Norwich NR4 7TJ

Date: 24th July 2012

Contributing authors:

- Professor Morten Hviid, ESRC Centre for Competition Policy and UEA Law School, University of East Anglia, Norwich NR4 7TJ. Email: m.hviid@uea.ac.uk
- Professor Bruce Lyons, ESRC Centre for Competition Policy and School of Economics, University of East Anglia, Norwich NR4 7TJ. Email: b.lyons@uea.ac.uk
- Dr. Sebastian Peyer, ESRC Centre for Competition Policy, University of East Anglia, Norwich NR4 7TJ. Email: s.peyer@uea.ac.uk
- Professor Duncan Sheehan, UEA Law School, University of East Anglia, Norwich NR4 7TJ. Email: duncan.sheehan@uea.ac.uk

The writing of the response, edited by Hviid and Peyer, is a joint effort. In two cases, questions 7 and 8, specific authors have been acknowledged.

The support of the Economic and Social Research Council is gratefully acknowledged.

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An ESRC funded Investment. The views and statements expressed are those of the authors and do not necessarily reflect the views of the ESRC.

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Introduction

The government rightly points out that there are basically two alternatives to encourage private claims. One can increase the reward by, for instance, multiplying damages or reducing the cost of bringing the case. Or one reduces the cost of enforcement actions. The fast track proposals aim at reducing cost and are a sensible proposal in the current system that is characterised by high litigation cost. Widening the jurisdiction of the CAT and trimming the procedure, especially for small-value cases, seems to be an appropriate remedy to get private antitrust litigation off the ground. Making better use of the CAT's expertise and introducing a streamlined procedure is a logical step in order to facilitate actions for consumers and small firms. Shifting the focus away from the damages remedy towards injunctions will help those firms which are interested in a quick solution to an antitrust dispute.

Before addressing those questions we feel we can contribute to, we want to highlight an important element of the consultation document. The BIS consultation document acknowledges the value of stand-alone cases in complementing public enforcement (4.8). This is a notable shift away from regarding private enforcement purely as a compensation mechanism. While not necessarily in conflict, the twin goals of deterrence and compensation do clash in a number of circumstances. The key issue to resolve in that debate is whether or not we view over-deterrence as a real problem. Recall that the idea that enforcement could be designed to deter future breaches rests on a presumption that firms undertake a cost-benefit analysis when making decisions, including on the extent and scope of their compliance programme. Fining guidelines make clear that the fine is set so as to ensure deterrence. Firms will take into consideration the full cost to them of their actions when making the cost benefit analysis. These include costs of legal representation and of private actions over and above the likely size of the fine. Unless public fines can accurately predict the

expected private damages, over-deterrence is a real issue. Only in cartel cases, where the action of forming a cartel is avoidable and where the action has no redeeming features may we be sanguine about over-deterrence. That is why the twin goals may be in conflict. In several of the questions, the answer depends more or less subtly on what the key goal is and we have tried to indicate this where appropriate. When the goal is predominantly deterrence, follow-on cases have very little merit, with the key benefits typically arising from imperfect enforcement by the initial public decision, either in terms of the size of the damages or the correct identification of the extent of the harm.¹

I. Competition Appeal Tribunal

1. Jurisdiction

Broadening the jurisdiction of the CAT is to be welcomed. The current set-up is overly restrictive and, especially after the Enron decision, severely limits follow-on claims before the CAT. The CAT's expertise is likely to matter more in stand-alone cases where competition issues are put to test. At the moment the CAT only adjudicates damages and causation. It would be a better use of resources and expertise if the CAT was given the jurisdiction to apply the substantive competition provisions in stand-alone cases. For this reason, it would make sense to enable the courts to transfer competition cases to the competition appeal tribunal. In order to avoid the situation in which mention of a competition issue already triggers the jurisdiction of the CAT, section 16 of the Enterprise Act should be used to grant judges some flexibility in their referral decision.

As argued by Harker and Hviid², for a private action to be an attractive proposition, speed and precision of a decision combined with low costs are essential. A specialist court is clearly to be preferred to a generalist court on these measures. In addition, such a court is also much more likely to be able to guard against strategic misuse of private actions.

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

Yes. Considering the CAT's expertise, this is a logical step. The proposed implementation of section 16 will provide courts with the opportunity to refer cases to the specialist CAT. However, if the proposal, as it is discussed in paragraph 4.17 of the consultation document, is implemented in its current shape, some cases may not benefit from the CAT's expertise. If our reading is correct, it appears that access to the CAT's resources for competition claims is only possible 'in certain cases where the judge is also a chairman of the CAT'. It may be useful to amend this proposal and include all cases that (partially) deal with competition law. Otherwise the use of the CAT would depend on the random factor of whether or not a judge is a chairman of the CAT. Overall, referring just the competition part of case to the CAT seems to be sensible, especially in cases where this is just one of the issues, for instance, in contract disputes.

¹ The recent Competition appeals Decision ([2012] CAT 19) in *2Travel v Cardiff Bus* raises additional concerns about follow-on actions. The existing legal framework enabled the CAT to award exemplary damages in this case. If we believe that detection, punishment and deterrence is the aims of the competition authority, then their decision should be respected in a follow-on case, with any concerns over the level of punishment being dealt with through an appeal of the original decision.

² Harker, Michael and Morten Hviid, 2008, "Competition Law Enforcement and Incentives for Revelation of Private Information", *World Competition* 31(2), 279-298.

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

Yes. The very narrow definition of the CAT's jurisdiction in follow-on cases prevents use being made of its expertise in cases where, arguably, it is most needed. It also leads to wasteful litigation determining the precise binding effect of regulatory decision as, for instance, in the Enron case.³ Stand-alone cases where the finding of a competition law infringement is crucial would benefit from the CAT's expertise.

Q.3 Should the CAT be allowed to grant injunctions?

Yes. The current limitations of the CAT's powers have diminished its attractiveness for claimants. Furthermore, the High Court's decision in *Purple Parking* shows that injunctions are an important element of private antitrust enforcement.⁴

2. Fast track procedure

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

The costs of litigation are likely to influence the decision of an injured party to seek compensation or an injunction. In general, fast track procedures are one possibility to overcome the cost problem (although it is only a second best solution to reforming the general cost and funding of litigation). The BIS proposals would encourage firms to bring cases against anticompetitive conduct.

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

Some of the proposed design elements may be problematic. Our concerns refer to the identification of fast-track claims, the cap on recoverable cost, and the waiver of the undertaking in damages for injunction claims.

The consultation document does not assign a maximum value for fast track cases unlike, for example, the limit that is set for small claims procedures (£5,000). Assigning a value to the case up to which fast-track litigation is available creates legal certainty as to the proceedings available for a particular claimant. The limit for cost recovery may suffice for the purpose of separating complex and complicated litigation from lower value and, maybe, easier cases. However, costs are hard to predict when an action is filed. From this perspective, it would make sense to introduce a clear limit up to which the claimant is able to bring a fast track action.

The proposed liability cap for the defendant's cost of £25,000 is also problematic (see para 4.28). As outlined above, a cost cap may help to separate SME cases from larger (cartel) cases. However, the claimant will only be liable for the defendant's cost up to the maximum threshold of £25,000 according to the BIS proposal. The defendant will be liable for any expenses that exceed the cap independent of the outcome of the claim. This is, in effect, a one-way fee shifting device for costs above the £25,000 threshold. If the defendant loses his case, the claimant's cost have to be reimbursed. However, if the claimant loses the case, he is protected from anything the defendant has spent above the threshold. This one-way fee shifting can have negative effects on the type of

³ Enron Coal Services Limited (in liquidation) v English Welsh & Scottish Railway Limited [2011] EWCA Civ 2.

⁴ Purple Parking Ltd v Heathrow Airport Ltd [2011] EWHC 987 (Ch).

cases that are brought. It encourages claimants to bring questionable cases forcing the defendant to settle for fear of rising costs. With after-the-event insurance available, the claimant may not risk much when bringing such a case under the proposed framework. If caps are applied in the suggested fast-track procedure, they should apply to both parties.

Interim injunctive relief can be a preliminary dispute resolution preventing damages from occurring in the first place or, at least, limiting them. The proposed waiver or limitation of the cross-undertaking can encourage victims of anticompetitive conduct to seek a quick dispute resolution. However, waiving or limiting the cross undertaking in damages potentially shifts costs from the applicant to the defendant. When a small or medium-sized company seeks preliminary protection against a large undertaking, the cross-undertaking covering potential costs for the loss of production may be huge depending on the sales or output. If the cross-undertaking in damages is waived, it would probably encourage firms to seek preliminary relief in those cases. However, if the defendant is a small or medium-sized business, a waiver may unduly shift the cost risks from the applicant to the defendant. Whereas a limitation of the undertaking in damages may be useful in individual cases, a complete waiver could unfairly shift the costs of an injunction when the defendant is a small undertaking.

We do think that the speed of legal proceedings matters for claimants, especially when faced with the choice of complaining to the competition authority or commencing a stand-alone action. However, it may be difficult to fix the time for legal proceedings to six months as proposed in the consultation document.

Q.6 Should anything else be done to enable SMEs to bring competition cases to court?

No additional suggestions.

II. Damages

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

Duncan Sheehan

A rebuttable presumption of loss has one important advantage; it means the claimant does not have to prove by how much the price has risen over and above the competitive level where much of the information needed to work this out is in the hands of the cartel. However, the assumption behind the consultation paper seems to be that there is only one potential head or type of damages in play here, so a rebuttable presumption that prices rise by 20% is at best only part of the story. The claimant, where it is a retailer (say), will be able to claim for lost profits, and in EU-related cases, this is mandated by the case of *Manfredi*.⁵ Lost profits can only be worked out on the basis of the position in the retailer's (direct purchaser's) market and therefore it will have to prove the whole loss where applicable. Similarly, as a matter of common law the decision in *Devenish Nutrition*⁶ to

⁵ [2006] ECR-I 6619

⁶ [2008] EWCA Civ 1086

the effect that gain-based damages are unavailable for competition infringements is dubious as argued by Sheehan.⁷ Gain-based damages that reflect the profits that the cartelist has made rather than the losses the direct purchaser has incurred should in principle be available. Calculating those profits in cases where the cartelist might have reinvested the initial profits in other activities is far from easy, but the courts are engaged in similarly difficult calculations of the gains made in cases of infringement of intellectual property rights. We noted earlier that in cartel cases at least there is less reason to worry about over-deterrence; if the law strips the cartelist of the gains that it makes then that removes the incentive to engage in the activity, although the precise deterrent effect would be reduced by the fact that not every cartel is detected. Exemplary damages, intended purely to punish and deter, will also be available in stand-alone cases and possibly also in follow-on cases.

One question therefore that the consultation does not ask and should have done is the broader question of what types of damages should be available to a private litigant in competition cases. There appears to be an unspoken – and possibly even unconscious – assumption that a breach of competition law is different from a normal tort action. There is a risk that if labelling a case as a competition case reduces the remedies that might otherwise be available from the courts there will be an effort to relabel them as something else. If we are to treat cases differently from the norm – and particularly if we are allowing standalone cases where no public enforcement might occur – this needs to be clearly argued for. It may be, however, for example that one way of making a fast-track procedure work is to reduce the number of heads of damages available to cover only actual immediate loss, thus reducing the complexity of the economic evidence required, and the time required to complete the case.

Bruce Lyons:

On the Rebuttable Presumption of a 20% Price Rise for Damages against Proven Cartels

The consultation document includes a suggestion that there should be a rebuttable presumption that the cartel has resulted in higher prices. 20% is offered as a possible presumed increase due to the cartel. This is an excellent idea and should be widely supported. The only room for debate should be over the precise presumption to adopt and whether to extend this approach beyond cartels.

Even when a cartel has been successfully prosecuted by the OFT, the current burden of proof is that a customer seeking damages has to prove how much she has been harmed. It is as if the presumption is that the proven cartel did not raise prices. If that were true, it would make one wonder why cartels were illegal in the first place. Of course, it is not true and there is well documented evidence that most cartels raise prices very substantially. Consequently, it is both equitable and efficient to presume that a cartel raises prices.

Why does the burden of proof matter if all one has to do is look at the evidence on prices? There are two problems. First, statistical data needs to be collected, but most of this is in the hands of the cartel. Second, the data must be processed to understand the economic effects of the cartel, and there is more than one way to do this. Taken together, there is plenty of room for obfuscation and it makes it very hard work for the (often numerous) customers to prove a precise level of damages.

⁷ Sheehan, D. 'Competition Law Meets Restitution for Wrongs' (2009) 125 Law Quarterly Review 222

20% will provide a focal point for a quick and low cost agreement when this is reasonably fair to both sides. It will also help the judge by providing a reasonable default if both sides get bogged down in an unhelpful destructive battle focused only on the weakness of the other's evidence.

In other areas of law, judges fully understand the principle that an informational advantage of one party should naturally lead to that party taking on the burden of proof. There is no reason not to adopt it for cartels. Competition law adopts two clear and central examples in which 'defendant' firms have to satisfy the burden of proof based on their informational advantage:

1. Article 2 of Regulation 1/2003 states: 'The undertaking or association of undertakings claiming the benefit of Article 81(3) of the Treaty shall bear the burden of proving that the conditions of that paragraph are fulfilled.' This is repeated in its Article 101(3) guidance. Furthermore, in its Article 102 guidance, the Commission uses wording implying a similar burden in the case of a dominant firm claiming offsetting benefits (even though there is no equivalent Article 102(3)): 'the Commission will look into claims by dominant undertakings that their [apparently abusive behaviour] may lead to savings in production or distribution that would benefit customers.'

2. Paragraph 87 of the Horizontal Merger Guidelines states clearly that the burden of proving efficiencies is on the merging parties precisely because they have access to all the relevant information:

'Most of the information, allowing the Commission to assess whether the merger will bring about the sort of efficiencies that would enable it to clear a merger, is solely in the possession of the merging parties. It is, therefore, incumbent upon the notifying parties to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the notifying parties to show to what extent the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers.'

As far as we are aware, these have not been challenged in the Court and are unlikely to be. More widely, the following points may also be brought into consideration:

a) In criminal law, the prosecution must place the accused at the site of the crime, but the defendant has the burden of proof if he claims an alibi that he was elsewhere at the time. This seems natural as the defendant is best placed to produce the evidence of where she was.

b) In a tort case of contributory negligence, for example, a car accident in which a passenger had encouraged a drunk driver to behave recklessly, the passenger's damages are reduced and a 50% reduction appears to be a standard starting point, even though further evidence may be used to determine a different final figure [e.g. Deakin et al 'Tort Law', OUP, 6th ed., pp899-901].

c) The doctrine of *res ipsa loquitur* ('the issue speaks for itself' because there is no reasonable alternative story) seems consistent with the idea we should start from non-zero damages; e.g. the cartel has been proved so this can be taken to imply higher prices.

The next issue is that if we are to presume a price rise, we need to have a suitable number to presume. Needless to say, no two cartels have exactly the same price increase, but that is not the point because the presumption is rebuttable if either plaintiff or defendant has the evidence to show otherwise. A casual thinker might claim that this requirement to specify a default number is a fundamental problem with the change in presumption from 'no harm'. This is not a serious

argument because zero is just another number but, unlike twenty, it is one that we know to be at the lower bound rather than somewhere in the middle of the true range. For the same reason, it provides a useful focus for a quick, low-cost, out-of-court agreement if 20% is 'about right' for a significant number of cases.

Is 20% the best number to use? Much of the economic evidence points to a somewhat higher average cartel effect, so I would not be averse to a slightly higher figure, but it is a cautious start that might be revised in the light of evolving evidence. As the consultation document notes, it also has the virtue of being the number I suggested when making the case for a rebuttable presumption in my response to last year's European Commission consultation on its draft guidance paper on the quantification of damages.

My one serious concern with the BIS proposal is in an important footnote attached to the relevant section (starting #4.40). This states that references to cartels should be taken to refer to any breach of the Chapter 1/Article 101 prohibition on anticompetitive agreements. This goes too far. In the case of cartels, damages in addition to a fine have a positive effect on deterrence. This is because the probability of detection times the size of fine is likely to be less than the payoff to cartel formation. Even in the unlikely event that it is not, there is no competition downside of excessive deterrence of cartels. However, where the main offence is an exclusionary practice, as opposed to exploitation of consumers, there is neither economic evidence to support the 20% figure nor a strong presumption of under-deterrence.

In particular, there is a substantial danger of chilling competition in the context of business practices that may result in foreclosure but in other circumstances may be pro-competitive (e.g. quantity discounts, exclusive dealing). Excessive deterrence is possible if the penalties of a business practice are seen to be large in one case where it is anticompetitive, and consequently other businesses play safe in avoiding the practice in circumstances where it would be pro-competitive. Furthermore, the reward of damages can act as an incentive for a weak competitor to threaten a private action in order to induce a strong competitor to compete less aggressively. This does not mean that there should be no damages actions in foreclosure cases. However, alongside the informational advantages a competitor is likely to have in relation to the relevant calculation of damages (relative to the information available to customers), it does suggest that courts might reasonably place the burden of proof on the plaintiff (i.e. foreclosed firm) in quantifying damages above zero.

Q.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?

Deterrence	Compensation
<p>(Hviid) If the aim is deterrence, stand-alone cases should be promoted. This involves incentivising those with the best information and strongest claim to act on behalf of society. These will typically be direct purchasers. This is recognised in the US decisions which give rise to the “no passing on defence” and with standing to bring a case limited to direct purchasers.</p> <p>An unresolved issue is to what extent a reward paid to the direct purchasers is passed on to the indirect purchasers. This partly depends on the nature of the reward and partly on what we believe about capital markets. If capital markets are not perfect, even a lump-sum payment to the direct purchasers may have beneficial effects down-stream if the payment is used to fund cost reducing or quality enhancing investments.</p>	<p>(Sheehan) Under current English law (as discussed by Sheehan⁸) there is no defence of passing on as such, but the law does have a mechanism for allocating losses between levels of claimants. From a compensatory standpoint this is required. The US Federal system referred to in the deterrence box fails to ensure that the person who suffers the loss obtains the compensation.</p> <p>The way in which this works is that the indirect purchaser piggy-backs his claim for loss on the top of the direct-purchaser’s claim. The direct purchaser retains some incentive to sue because it will retain the right to a gain-based remedy where the infringer has made a profit over and above the losses compensated. In cases where the direct purchaser is disinclined to sue, and there is evidence and literature describing when this might be, the indirect purchaser will be able to force the direct purchaser to do so. Any exemplary damages that might be available in a standalone case will also go to the direct purchaser. It was previously suggested that an unasked question that needs to be considered is precisely what types of damages ought to be available to a competition claimant. The availability of these other measures of damages to the direct purchaser, but critically not the indirect purchaser, will preserve the former’s incentive to sue, and therefore the deterrence effect of the regime. Without consideration of these matters in the round any legislative intervention to change the law is likely to be piecemeal, have unforeseen effects, and encourage attempts to force cases in or out of the regime for purely tactical purposes.</p> <p>The current model that the law uses has other advantages – it is consistent with wider private law analyses and therefore there is less incentive to try to get into or out of a special competition law regime. Further the defendant is not put to trying to get statistical and other evidence about the direct purchaser’s business and what prices it might have charged had there been no infringement – information he does not have.</p>

⁸ Sheehan, D. ‘Passing on, Indirect Purchasers and Loss Allocation between Claimants’ [2012] Lloyds Maritime & Commercial Law Quarterly 261

It is likely valuable to split proceedings in private actions between establishing liability and damages, on the one hand, and distribution of proceeds, on the other. The court is well placed to deal with the first questions, but for the division of the overall damages to be done with any degree of accuracy is a much more involved process and almost invariably requires the use of experts. While estimating elasticities provides a first step in such a division, the principle of the duty to mitigate losses likely apply, requiring the adjudicator to assess likely substitution possibilities. It is important that the reason for liability and total damages is well understood not just by the defendants, but more generally to ensure that the decision adds to deterrence. The same cannot be said for the division of the damages, especially where there is a chain of indirect purchasers and the main issues may be how to divide the damages fairly among those harmed.

III. Collective actions

Given that the harm from breaches of competition law in many cases is spread over many individuals and for each of these is relatively modest, if compensation in competition cases is desirable, some form of collective redress is essential. The added value of collective redress depends on a number of parameters including the objective of the enforcement system, the actors who are allowed to bring collective actions, the choice of claim aggregation mechanism (opt-in or opt-out), the incentives to bring a claim provided in a given legal system, and the cost resulting from a system of collective redress. However, there are also doubts as to the merits of collective actions. The example provided in Box 4, price fixing of toys, exemplifies the issue. Assuming that an opt-out action was successfully brought on the back of the government intervention against Hasbro, Argos and Littlewoods, how would the damages award be distributed? The costs of distributing the award are likely to be higher than the individual loss of each consumer which the consultation documents states to be just a few pounds per individual. If the damages award is used for consumer education instead, the goal of compensation becomes less credible. In cases where the individual amount of damages is very low, collective actions are a device to skim off part of the profits from the infringer but are unlikely to achieve redress.

Since follow-on actions lead to a duplication of disputes – the same case was scrutinised by the competition authority and, normally, the appeal court – it may be worth considering empowering the NCAs to include agreements on damages in any settlement procedure. This could include setting up a cy pres award where the total harm is easy to calculate but where the victims are hard to identify. It is also worth considering whether it is appropriate to disgorge some of the fine to compensate easily identifiable victims of the anti-competitive act. This would be a better, more cost effective, alternative to running the case again as a follow-on litigation. The actual design of a system where the NCA rather than a court set compensation may be quite complicated and would need careful consultation.

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

No views

Q.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.

The Government's plan to introduce a collective action mechanism just for competition law begs the question in what respect competition law differs from other areas of law. In consumer law or environmental law illegal conduct may violate the rights of a multitude of individuals who suffer small individual harm. If collective actions are thought to be an appropriate tool to address the problem of dispersed losses, it may be useful to use a consistent approach across different areas of law. Adjacent issues like, for instance, the funding of litigation are better addressed for a number of torts instead of solely competition law.

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

It is not obvious that collective redress should be open for SMEs in competition cases. Such cases would raise serious concerns about concerted practices because they afford firms in otherwise competitive industries the means to get together and legally discuss economic matters including how they deal with either suppliers or buyers. There is clearly a serious risk that this can lead to agreements or concerted practices which would violate Article 101 TFEU or chapter 2 of the Competition Act, or even worse the sort of tacit understanding which competition law is not well equipped to tackle. Where the buyer or supplier is a dominant firm it may be that the collection of SMEs could be given immunity from competition law because they are simply providing countervailing power to the dominant firm, but the conditions under which this would be advisable would need very careful consideration. Note also that a collective action requires that the individual parties have identical or very closely related interests and concerns, exactly the case where the danger of coordinated effects, if there is a coordinating device, would be most harmful.

The key question when deciding on extending collective actions to businesses is surely why this is needed. Why are small businesses not able to fund appropriate litigation? As argued elsewhere, the key to boosting relevant private actions is to keep costs low. Moreover, opening the possibility of collective redress will require careful consideration of where the line should be drawn. Just small firms? Sole traders? Partnerships?

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

Information sharing would be a problem if undertakings were allowed to bring collective actions. It is doubtful that the case management powers of the court or CAT would be able to prevent parties from sharing information. This provides a separate reason for not extending the collective action option to businesses.

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

Assuming that the competition authority has the powers and abilities to impose appropriately deterring remedies, pure follow-on cases would add nothing positive to deterrence but mean duplication of enforcement efforts. They would limit the scope of strategic litigation aimed at distorting future competition, but not necessarily non-meritorious litigation.

Collective action enables small claims to be "consolidated" and increases the likelihood that such litigation is successful. Hence if the aim is purely or predominantly compensation, then some form of

collective action is not just desirable but also necessary. An open question is whether there are better ways to aggregate the claims. Otherwise, allowing collective action in follow-on cases mainly wastes resources and increases legal bills and insurance premiums.

Where stand-alone actions are aimed at least in parts at compensation, collective action should be allowed. Note that stand-alone actions contribute to both deterrence and compensation, but they are also more costly to finance and hence a collective action will be much more essential to get such cases off the ground.

The key concern here as in question 12 is who should have standing to bring such an action.

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

The key concern for a collective action is the funding thereof. Opt-out actions ensure a greater class and hence make access to funding more likely. However, it is questionable whether the case management of the CAT can prevent or limit strategic litigation in an opt-out class action. The answer also depends on whether or not standing is limited to consumer claims. Designing the system with the necessary safeguards would be considerably more difficult if businesses were also given standing to bring opt-out collective actions. Finally, the relative merits of opt-out collective actions are determined by the ability to compensate consumers if compensation is the aim of collective actions. Compensation in class actions depends on how the reward is distributed to affected individuals. Thus, the efficacy of collective actions does not only depend on the choice of the claim aggregation model (opt-in v opt-out) but also on the distribution of the proceeds. Overall, opt-out class litigation may do better gathering a critical mass of individual claimants but this may not have much merit if consumers do not receive redress.

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

As argued above, extending the collective action option to businesses brings added complications to procedures and rules and increases the cost of enforcement without commensurate benefits. Once collective actions are restricted to consumer claims, then the list of six bullet points in A.3 appear sensible.

Q.16 Should treble or other punitive damages continue to be prohibited in collective actions?

If the aim of private antitrust enforcement is compensation, there is no need to consider multiple damages awards. If instead the aim is to enhance enforcement and deterrence by delegating some of the enforcement to (groups of) private individuals, then one could possibly argue in favour of a multiplier to increase incentives, but it may be advisable instead to resort to the current common law on punitive damages.

It may be sensible to allow for a later introduction of a damages multiplier if future analysis of the number and type of cases indicates an inadequate level of desirable private actions.

Q.17 Should the loser-pays rule be maintained for collective actions?

Yes, there should be no exception to the loser-pays principle. This principle reduces the risk that cases with few merits are actually brought. Any type of fee shifting incentivises not only 'good' actions but also questionable cases.

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

Two reasons are commonly offered for asymmetric fee shifting. One is that we want to incentivise private litigants and one way fee shifting reduces the risk they face. This argument is particularly compelling when the law is new and not well understood or the courts are not experts, thereby increasing the risk of an adverse decision. The other is that the case may settle or clarify the law to the benefit of future enforcement. This type of positive externality benefits society but not the litigant and hence the litigant does not have the right social incentives to bring the case.

The answer depends partly on the division of labour between public and private enforcement. If the competition authority is tasked with clarifying the law and supporting the courts in their decision making through, for example, amicus briefs, the externality and risk is basically dealt with by the public authority and there is no argument in favour of limiting the loser-pays rule. If we expect private actions to “improve” or clarify the law, then there may be a case for encouraging litigants through asymmetric cost shifting. This may be plausible. At present the precise shape of the private law rights litigants have in competition law does seem relatively badly understood.

Q.19 Should contingency fees continue to be prohibited in collective action cases?

In particular if the aim is compensation and if the cost of litigation cannot be brought down dramatically, then to be serious about private action, these must be financed in some way. The Jackson report makes clear the good and bad sides of conditional and contingent fee systems. It is hard to see how large scale antitrust cases could be funded without some sort of bounty scheme.

Q.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.

This depends on the aims of the specific body. The unclaimed sum should in some way benefit the overcharged consumers. This would make options “b”, “c” and “e” less attractive. Option “a” offers more flexibility than “d”, but this depends on which scheme is named and what it would spend the money on. The remit should be broad enough to include competition advocacy and education as well as research funding.

As a researchers we have a special interest in future research funding resulting from unclaimed sums not being ruled out. From our experience, it is important to have ongoing research in an area where there are a lot of unexplored issues, in particular at a time where public funding for such research will be under threat.

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

The document mentions the Access to Justice Foundation as a potential recipient under “d”. This foundation has a very narrow aim and would for example not include competition advocacy and education or research funding; something which we understand happens with some US cy pres funds. We do not believe that the Access to Justice Foundation with its current remit would be appropriate, but neither are we aware of a current suitable alternative. It maybe that a new body would have to be set up.

Q.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?

As some of our answers indicate, to set up a system which is workable requires a number of procedural rules to be in place, many of which have possible adverse effects as well. Since such private bodies are going to face less public scrutiny than a competition authority, there is a real danger of unintended consequences from granting private bodies such ability. Since the government has indicated that it does not intend to devote resources to ensure compensation or redress for consumers, consumer bodies could be assigned with this task. This compromise limits the number of private bodies that can bring actions which, in turn, may help to build up expertise in those organisations. It also minimises the risk that adverse effects occur.

Q.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?

There is no point in giving the rights to entities who do not have the financial clout to bring the case to a close. One advantage of legal firms undertaking the work is that they are taking the chance of a case with their own money and hence are likely to take a more credible view of the strength of the case.

IV. ADR

The proposed encouragement of ADR contradicts the aim of speeding up proceedings, at least with respect to the outlined fast track. The Government's suggestions to promote ADR are based on the assumption that court proceedings are expensive and cannot deliver swift dispute resolutions (see benefits of ADR referred to in para 6.2). At the same time, the consultation paper promotes ideas to streamline the CAT procedure aiming at cheaper and faster legal proceedings. It is without a doubt that means of alternative dispute resolution (ADR) play a part in resolving disagreements between individuals; however, the question is what their contribution will be in a fast track procedure. The latter aims at resolving cost and time problems and so do ADR. The additional benefits of ADR in competition litigation are doubtful if parties are offered a relatively inexpensive fast track which does not preclude settlements. It would be a different matter if there was no streamlined procedure. But even in the absence of any fast-track the empirical evidence on the effects of ADR outside the competition sphere is rather mixed. The mostly US-based studies report higher settlement rates for ADR; however, there does not seem to be an agreement about the actual cost savings in comparison with court procedures. Overall, the question is why we do not fix the problem (costly litigation) but try to encourage other methods of disputes resolution?

Another disadvantage of ADR is the potential effect on general deterrence. The primary goal of private enforcement is contentious. However, independent of whether the primary goal is deterrence or compensation individual actions contribute to the deterrence effect of public law enforcement (stand-alone actions will probably add more additional deterrence). To deter future infringements, law enforcement requires a certain level of publicity. Whereas judicial proceedings are normally held publicly and, thus, send signals to firms about the consequences of illegal conduct, ADR does not produce such publicity. Negotiations between the parties are normally subject to

confidentiality and less likely to raise the awareness of competition issues unless the competition authority or an ombudsman are involved.

It is worthwhile to consider the relevance of ADR according to type of violation.

	Article 101: Cartel infringements	Article 101: Other agreements	Article 102: exploitative abuses	Article 102: exclusionary abuses
Issue for private action	Overcharge	Dispute over contract terms	Dispute over contract terms	Either dispute over contract terms or attempt to create a contract; or predation
Value and relevance of ADR	ADR not well placed to resolve dispute over how much compensation should be paid. If it was, then the dispute is over the price paid under a contract and such disputes are likely already covered by ADR.	ADR already available for contractual disputes, so adds nothing	ADR already available for contractual disputes, so adds nothing	In first case, ADR already available for contractual disputes, so adds nothing. In second case, there is no current ongoing relationship to preserve. For predation, see text below

Predation is in many ways the odd-one-out, but also the one case where ADR would be a particularly bad idea. The consultation does not say much about strategic misuse of private actions. One area of competition law where particular concern about such misuse has been expressed is predation, where a firm could initiate a case to signal to a rival that it was unhappy about the rival's new lower price.⁹ Allowing horizontal rivals openly to discuss whether one or other has too low a price would itself violate competition rules.

The entries in the table serves as a reminder that many potential competition disputes are also in essence contract disputes. Since ADR is typically already used in those, raising the issue of ADR in competition cases adds nothing to those cases. In reality, the only cases where ADR would not already be in place would be where they are not really appropriate, i.e. where the issue is the lack of an ongoing relationship, not the preservation of one.

⁹ See for example work by Daniel Crane such as:
Crane, Daniel A., The Paradox of Predatory Pricing, 91 Cornell L. Rev. 1 (2005-2006).

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

ADR should not be made mandatory. The aim of the streamlined CAT procedure is to grant firms and individuals quick access to justice. A mandatory and, maybe, drawn-out negotiation process would run counter to this objective.

Q.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?

It is generally argued in the law and economics literature that settlement fails for one of two reasons. The parties have different and incompatible views about the likely outcome of litigation [e.g. both think they are more likely than not to win]. The parties have asymmetric information about either the quality of the evidence and hence the likelihood of winning at litigation or the size of the harm which can be established. Anything which aligns expectations and creates symmetry of information aids the probability that settlement occurs. From that perspective a well crafted pre-action protocol could increase the probability of settlement.

Q.26 Should the CAT rules governing formal settlement offers be amended?

The rules of formal settlement offers should be extended to the CAT. These settlement offers rules provide another aid to settlement and protect the defendant against nuisance suits.

Q.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.

Not relevant for a research centre.

Q.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?

No view

Q.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?

Accepting that follow-actions are costly to run, that someone in the end has to meet this cost, and that consumers are among the most likely candidates to meet this cost through higher prices somewhere, then this option should be given careful consideration. Appropriate safeguards should be put in place.

Q.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?

Logically the answer should be yes. The cost of making redress is part of the cost of having taken the action which lead to the violation which has given rise to the redress in the first place. With a goal of ensuring that the fine deters future actions but no more, such redress should in essence be disgorged from the optimal fine.

V. Public and private enforcement

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

Although claimants' legal actions are not motivated by the additional deterrence but rather the private gain, there are cases where the private motivation to bring cases overlaps with what is desired from a welfare perspective. From a deterrence perspective,¹⁰ the beneficial effect of private actions stems from the cases that reveal prior unknown infringements.¹¹ Stand-alone actions bring new infringements to light, thereby increasing the probability of detection and contributing to deterrence. Follow-on actions only contribute to deterrence if the investigation by the competition authority, including the fashioning of any necessary punishment, was inadequate.

Q.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?

Yes. Private follow-on actions against cartels benefit from leniency programmes. These actions would probably not be brought if there was not a government investigation in the first place. It is the very existence of leniency programmes that enables competition authorities to commence many of their cartel investigations. The short term gain of private access to these documents would be outweighed by the long-term loss, namely, the decreasing detection rate. A decreasing detection rate, in turn, would harm future victims and potential claimants. The Court of Justice of the European Union has stressed that the principle of effectiveness requires access to justice for claimants and does not preclude access to leniency programme. However, the principle of effectiveness may, at the same time, require that leniency programmes are protected to enable the detection of future infringements and, thus, enable cartel victims to bring their claim. Claimants in follow-on actions should not get full access to the leniency documents.

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

As we have seen in the US with the Antitrust Criminal Penalty Enhancement and Reform Extension Act (ACPERA), it may be necessary to protect the firm who achieves immunity from public fines from the full force of subsequent private litigation.¹² The key concern for the firm who is granted immunity is that it may be jointly and severally liable for the full cartel overcharge, which if we allow opt-out collective action could be substantial. The firm who is granted immunity may be particularly vulnerable as a focus for a law suit because it has all its profits intact from the violation [hence more likely to be able to meet the demands from the litigation] and may be seen to be fair game since it has escaped from the public enforcement activity without harm.

¹⁰ Rather than ensuring that private rights can be enforced.

¹¹ Harker, Michael and Morten Hviid, 2008, "Competition Law Enforcement and Incentives for Revelation of Private Information", *World Competition* 31(2), 279-298.

¹² There is a problem (potentially) with this, see also blog post by Sheehan. Art 1 Protocol 1 of the European Convention on Human Rights protects possessions and a chose in action, such as a private law right against a competition infringer is a possession. We do need to be careful therefore in how we protect the firm not to infringe claimants' A1P1 rights. Removing the joint and several liability of the firm would not seem to violate these rights, as the value of the rights held by the claimant is not reduced, but removing a cause of action otherwise available to the claimant probably would violate their A1P1 rights.

It may matter what courts will decide about contribution among the jointly liable firms. Existing cases are concerned with situations where the joint and several liability arises because one party is vicariously liable for the damages caused by the other so that the parties have differing levels of responsibility for the harm. In cartel cases all those jointly and severally liable engaged in the harmful act and have similar responsibilities for any harm. This may reduce or remove contribution. As shown by Hviid and Medvedev,¹³ where there is no contribution, there is a strong incentive to settle early in return for revelation of incriminating information about the cartel because no later contributor can claim from the firms who had already settled. Depending on how much can be learned from the decision of the authority, the litigants may have very little incentive to settle with the firm who received immunity, leaving it last to face the larger amount of liability.

While some may argue that the need for protection of such a firm is greater in the US than in the UK because of treble damages, this does depend on whether it is really the case that the expected liability is that much greater in the US. Some have argued that because there is no pre-judgement interest in the US, depending on rates of discount used, there may be little or no difference between trebled no pre-trial interest damages and single pre-trial interest damages.

Granting this protection potentially reduces the amount of damages which can be recovered. The only argument against protecting the firm who gets immunity is that with the change in rules there is now a strong incentive for the richest firm to win the race to the authority to obtain immunity and this may leave the litigant without access to the resources of the only firm who could actually meet the full demand. Thus those harmed may be denied full compensation. For that reason, only the firm who gets immunity should be protected, but it should still be liable for the private losses it has caused.

Q.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.

Courts as well as competition authorities do make mistakes. There is a general problem regarding the precedence set by CAT and High Court decisions in stand-alone cases and in particular where a bad precedence is being set. The CMA must have the ability and means to monitor what cases are going through the courts and the CAT and the resources to provide advice as a friend of the court through amicus briefs. Should the CMA have the power to seek a review of, or appeal, the decision in a private action?

VI Other comments

The Impact Assessment and the actual consultation document are inconsistent with regards to the aim of private enforcement. The impact report picks up on compensation whereas the consultation document promotes fairness and growth. The latter objective of a reform of private antitrust enforcement is laudable but also problematic. There is no conclusive empirical evidence that would establish a connection between more law enforcement and direct welfare effects like, for instance, growth.

¹³ Hviid, Morten and Andrei Medvedev, 2010, "The Role of Contribution among Defendants in Private Antitrust Litigation", *International Review of Law and Economics* 30(4), 306-316.

Limitation periods

The consultation document has not covered the issue of limitation periods for follow-on cases in the CAT. The standard limitation period for tort case in the courts is six years. The CAT's limitation period for follow-on action is two years. The two years limitation period begins to run when the public decision becomes final, i.e. after any appeal period has expired or the appeal decision has become final. The two years limitation period for CAT proceedings is relatively short and has led to satellite litigation in a number of cases. If section 16 of the Enterprise Act is amended, a case commenced in the high court would benefit from the six years limitation period whereas a case that is brought in the CAT must be brought within two years. This means that claimants will be likely to commence proceedings in the High Court. In effect, this undermines the efforts to make the CAT the primary place for follow-on but also stand-alone competition actions. Particularly fast-track follow-on actions that ought to benefit from the quicker and cheaper procedure in the CAT may be time-barred in the CAT, and claimants would have to initiate their case in the High Court. The government should address this issue, maybe by adopting the longer limitation period for torts in the CAT.

Types of damages available

It is important to be clear on what sort of damages should be available in a private action. The Devenish decision discusses a number of these. The decision in the Cardiff Bus case¹⁴ raises the question of whether or not there should ever be the possibility of awarding exemplary damages in a private follow-on action for breach of competition law. To be a follow-on claim, there must already have been an infringement decision by a relevant competition authority. Where it finds an infringement, the competition authority is tasked with designing an appropriate punishment aimed at deterring and punishing the anticompetitive conduct. When the follow-on case is commenced, the matter of punishment has already been dealt with and non bis in idem [not twice for the same] should rule out subsequent exemplary damages. To ensure the proper division of labour between public and private enforcement and to keep private actions cost effective, clarity in what sort of damages are available, and when, would seem to be essential.

¹⁴ 1178/5/7/11 2 Travel Group PLC (in liquidation) v Cardiff City Transport Services Limited. [2012] CAT 19.