

Private actions in competition law: effective redress for consumers and business

Discussion paper

April 2007

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FOREWORD

The Office of Fair Trading ('OFT') is conducting an informal consultation on how to make redress for consumers and business for breaches of competition law more effective. The documents relating to this consultation can be viewed and downloaded from the OFT's website, www.offt.gov.uk. Hard copies may be ordered free of charge both online and on 0800 389 3158.

Views on any issues raised by this document would be welcomed. We seek comments from any interested parties and would ask respondents to supply a brief summary of the interests or organisations they represent, where appropriate.

Subject to the responses received, we envisage (i) making recommendations to the Government as to the steps which can be taken at the domestic level to improve the effectiveness of redress for those who have been harmed by breaches of competition law, (ii) responding to the European Commission's forthcoming White Paper on damages actions for breach of the EC antitrust rules, and (iii) taking action ourselves, within the limits of the legal framework in which we operate, to facilitate more effective redress for consumers and business.

Responses should be submitted in writing (by email, letter or fax) by 13 June 2007 to:

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DEFINITIONS

In this Paper, the following terms have the following meanings:

- CA98 means the Competition Act 1998
- CAT means the Competition Appeal Tribunal
- CPR means the Civil Procedure Rules
- EA02 means the Enterprise Act 2002
- ECN means the network of public authorities applying the EC competition rules
- NCA means a public authority belonging to the ECN, and
- OFT means the Office of Fair Trading.

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1 INTRODUCTION

1.1 The purpose of this Discussion Paper is to inform the ongoing debate within the UK and elsewhere on the issue of how to make redress for consumers and business for breaches of competition law more effective. Based on the outcomes of this debate, we intend to:

- make recommendations to the Government as to the steps which can be taken at the domestic level to improve the effectiveness of redress for those who have been harmed by breaches of competition law
- respond to the European Commission's forthcoming White Paper on damages actions for breach of the EC antitrust rules, and
- take action ourselves, within the limits of the legal framework in which we operate, to facilitate more effective redress for consumers and business.

1.2 Most of the main structural and legal elements for effective private actions in competition law are already in place in the UK. However, consumers and small and medium-sized businesses (in particular) face a number of practical barriers which have to date made them reluctant to take action to enforce their rights. A more effective system would benefit not only those categories of potential claimant, but would also promote a greater compliance culture, and ensure that public enforcement and private actions work together to the best effect for consumers and for the economy.

1.3 With these considerations in mind, this Paper sets out the principles that we believe should inform improvements to the existing system to ensure that it allows for effective redress and enhanced compliance with competition law, but - importantly - without at the same time giving rise to a 'litigation culture' that may be harmful to legitimate business activity. Businesses that comply with competition law have nothing to fear from the proposals put forward for discussion. Conversely, businesses harmed by cartels and other anti-competitive practices should

be better placed to recover their losses and address the competitive disadvantage they may have suffered from infringements.

2 BACKGROUND

- 2.1 Competition within the economy is good for business and good for consumers. Strong competition regimes encourage open, dynamic markets, and drive productivity, innovation and value for consumers. Competitive and open markets at home increase the global competitiveness of UK firms, raising economic growth and standards of living in the UK, and benefiting consumers by ensuring lower prices and a greater variety of goods and services.
- 2.2 The 1999 White Paper '*A World Class Competition Regime*'¹ set out the Government's blueprint for building a strong and effective competition regime in the UK. That White Paper recognised the significance of private competition law actions as a means to allow consumers to obtain redress where competition has been distorted, and to ensure the optimum use of public and private resources. It set out a number of measures aimed at paving the way for more effective redress.
- 2.3 In its response² to the European Commission's 2005 Green Paper, *Damages actions for breach of the EC antitrust rules* and the accompanying *Commission Staff Working Paper* (the 'Green Paper'),³ the Government reiterated its support for moves to facilitate private actions for those (both consumers and businesses) who suffer loss due to breaches of competition law. The Green Paper put forward a number of proposals for consideration, and has been extremely helpful in stimulating the debate in this field. The European Commission intends to publish a White Paper for consultation in due course.

¹ Cm 5233.

² The Government and the OFT both submitted responses to the consultation. The responses are available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_contributions.html.

³ The Green Paper is available at <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/index.html>.

2.4 The Government and the OFT are fully involved in this debate, and have continued to consider ways of building on the work already done in this area. In HM Treasury's *Pre-Budget Report*,⁴ the Government signalled its intention to work with the competition authorities and the European Commission to identify and eliminate any barriers to redress for parties injured by anti-competitive behaviour. In the Budget itself, the Government indicated that the OFT intended to consult on this Discussion Paper and welcomed the progress that the OFT had made.⁵

The focus for reform in the UK

2.5 Most of the main structural and legal elements for effective private actions in competition law are already in place in the UK. Accordingly, we consider that the current focus should be on improving the existing system. To this end, any proposals designed to make private competition law actions more effective should be in line with the following principles:

- consumers and businesses suffering losses as a result of breaches of competition law should be able to recover compensation, both as claims for damages on a standalone basis as well as in follow-on cases brought after public enforcement action
- responsible bodies which are representative of consumers and businesses should be allowed to bring private actions on behalf of those persons
- private competition law actions should exist alongside, and in harmony with, public enforcement

⁴ *Pre-Budget Report, December 2006, Investing in Britain's potential: Building our long-term future*, Cm 6984, paragraphs 3.11 et seq, available at www.hm-treasury.gov.uk/pre_budget_report/prebud_pbr06/prebud_pbr06_index.cfm.

⁵ *Budget 2007, Building Britain's long-term future: Prosperity and fairness for families*, 21 March 2007, HC 342, paragraphs 3.40 et seq, available at www.hm-treasury.gov.uk/budget/budget_07/report/bud_budget07_repindex.cfm.

- any changes must be aimed at providing access to redress for those harmed by anti-competitive behaviour, whilst at the same time guarding against the development of a 'litigation culture', in particular the costs, diversion of management time and chilling effects that can arise from actual or threatened ill-founded litigation
- processes and systems should be available to facilitate effective ways of resolving private competition law actions, and to encourage settlement of cases without going to court or trial wherever possible, and
- the right balance should be struck between requiring defendants and others to disclose relevant materials to claimants, and ensuring that this process is not abused.

2.6 This Paper puts forward for discussion a number of issues and options in line with these principles.

Public enforcement and private actions working together

2.7 Private actions are an essential complement to public enforcement in the overall scheme of the competition rules, and we aim to help develop a system where public enforcement and private actions work alongside, and in harmony with, each other to the best effect for consumers and for the economy.

2.8 It was already clear at the time of '*A World Class Competition Regime*' that cartels and other anti-competitive practices cause significant harm to consumers and business. That White Paper referred to the findings of the Competition Law and Policy Committee of the Organisation for

Economic Co-operation and Development (OECD), which found that cartels are a major and largely invisible drain on the world's economy.⁶ The total harm to the economy caused by all anti-competitive behaviour is even greater, as it includes harm resulting from anti-competitive agreements other than cartels and from unilateral conduct (abuse of dominance).

- 2.9 There is no reason to believe that the OECD's conclusions are less true and compelling now than they were then, or that cartels and other anti-competitive practices affecting consumers in the UK are less prevalent. The following three recent examples illustrate the impact that such behaviour can have on consumers in the UK.

In *Hasbro/Argos/Littlewoods*,⁷ a leading toy supplier entered into agreements to fix prices with major retailers. The OFT estimates that if the cartel had not been brought to an end by the OFT's intervention, consumers would have been overcharged by over £40 million as a result.

In *Replica Football Kit*,⁸ price fixing agreements to increase the price of replica football kits would, the OFT estimates, have cost the consumer over £50 million had they not been brought to an end.

During the OFT's current bid-rigging cartel investigation,⁹ 57 companies have been raided, and 37 companies have applied for leniency. As a result of the investigation, the OFT has uncovered evidence of bid-rigging in thousands of tenders with a combined estimated value approaching £3 billion.

⁶ The OECD reported that in the US alone, ten condemned international hard-core cartels (i) cost individuals and businesses many hundreds of millions of dollars annually, (ii) affected over \$10 billion in US commerce, with overcharges of over \$1 billion, and (iii) caused even more harmful economic waste estimated at over \$1 billion.

⁷ See OFT press release 149/06, dated 19 October 2006.

⁸ Ibid.

⁹ See OFT press release 49/07, dated 22 March 2007.

- 2.10 A system which incorporates effective public enforcement and a real possibility of private actions will increase the likelihood that anti-competitive behaviour is detected and addressed (whether by way of a complaint to the competition authorities, an approach to the infringing undertaking(s), or through the issuing of legal proceedings). A more effective private actions system would increase the incentives of businesses to comply with competition law, since the potential incidence and magnitude of any financial liability to a competition authority and/or a claimant will increase. As these financial risks increase, so does (or should) the interest of those ultimately responsible for the governance of the business (especially supervisory boards and non-executive directors) or for supporting the business (including, for example, financiers and investor groups). In this way public enforcement and private actions are complementary.
- 2.11 In terms of the type of damages that may be recoverable, it is well established that private actions involve claims for damages that are compensatory in nature.¹⁰ In certain circumstances, the courts may award restitutionary damages, which aim to strip away some or all of the gains made by a defendant which arise from a civil wrong. Furthermore, exemplary damages might be available in certain circumstances in England and Wales.¹¹ Other forms of relief, such as the equitable remedy of accounting for profits, may also need to be considered in some cases. It will be for the courts to determine how the general principles for determining loss or damage in various types of case apply to actions for infringement of competition law.

¹⁰ *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, HL. Lord Blackburn said that the general principle is that the court should award 'that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation'.

¹¹ *Rookes v Barnard* [1964] AC 1129, HL; *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122, HL.

Potential hurdles to effective private actions

2.12 It is difficult to assess the extent of demand that exists for greater redress of harm caused by cartels and other anti-competitive practices. Businesses and consumers are often unaware that they are being, or have been, harmed by such behaviour. Cartels are covert, and other anti-competitive practices (for example, predatory pricing) are often difficult to identify. Even if a consumer becomes aware of anti-competitive behaviour, it may be that the individual's loss is so small that it is not in his interest to pursue an individual claim to recover it, although the aggregate loss to consumers at large may be very significant. Legal costs and uncertainty as to the outcome of the proceedings may also act as a disincentive to the bringing of well-founded claims by both consumers and businesses. It is notable that, so far, consumers appear to have obtained virtually no redress in private competition law actions. It is unclear how extensively businesses have obtained redress to date, given that few successful cases have been reported and that the details of any private settlements that have been reached are confidential.¹²

¹² It is generally understood that the sums involved in some of these private settlements are not insignificant.

3 SUMMARY OF ISSUES AND OPTIONS

3.1 In order to build on the work that has already been done in this area, and to improve the effectiveness and efficiency of the legal system in dealing with breaches of competition law in the UK, this Paper puts forward the following issues for discussion.

Representative actions

3.2 To realise economies of scale and address barriers to individual action, there may be merit in broadening the availability of representative actions, by means of which representative bodies may bring actions on behalf of a category of persons.

The following suggestions are considered:

- measures that would require all Member States to ensure that there is an effective collective means (especially for consumers) of bringing claims for breaches of competition law in the relevant Member State, and
- allowing designated bodies, or bodies granted permission by the courts, (together 'representative bodies') to bring standalone representative actions on behalf of consumers,¹³ and giving representative bodies the power to bring follow-on and standalone representative actions on behalf of businesses.

3.3 This section also discusses a further possible means of enabling lower value private actions by providing for county courts at Chancery District Registries in England and Wales to hear smaller individual competition cases.

¹³ Representative follow-on actions in the CAT on behalf of consumers are already possible under section 47B of the CA98.

Costs and funding arrangements

3.4 Potential exposure to litigation costs may act as a major disincentive to the bringing of well-founded private competition law actions.

The following suggestions are considered:

- the introduction of conditional ('no win, no fee') arrangements under which it may be possible to allow a percentage increase on fees of greater than 100 per cent if a case is won,¹⁴ and
- providing for clearer guidance on ex ante costs-capping orders, allowing the court to cap the parties' liability for each other's costs.

Evidential issues and applicable law

3.5 Claimants (in particular, consumers and small and medium-sized businesses) may face substantial evidential barriers in bringing competition cases.

The following suggestions are considered:

- providing for the binding effect of infringement decisions by an EU NCA on the application of Articles 81 and 82 of the EC Treaty ('Articles 81 and 82') in competition cases before the courts of EU Member States on an EU-wide basis or alternatively on a reciprocal basis, and
- providing that although a claimant must prove that he has suffered loss, the burden of proving that a claimant has 'passed on' that loss to customers should lie with the defendant.

¹⁴ Conditional fees are known as 'speculative fees' in Scotland.

3.6 This section also discusses issues relating to disclosure, and cases with an international element, where claimants face issues of applicable law which add complexity to, and may discourage, private actions.

Effective claims resolution and the interface with public enforcement

3.7 It is important to ensure that cases are only brought to court and to trial where they cannot be resolved by other means, and that court proceedings are not used in a manner that may compromise public enforcement.

The following suggestions are considered:

- encouraging early exchange of information between the prospective parties to proceedings so that the claim can be fully investigated and, if possible, resolved without the need to issue proceedings
- considering other ways in which parties may resolve claims effectively, including by establishment of a Competition Ombudsman
- excluding leniency documents (appropriately defined) from inspection and use in civil litigation without the consent of the leniency applicant
- providing additional incentives to apply for leniency (for example, by removing joint and several liability for immunity recipients), and
- providing consumers and businesses with clear and user-friendly information about private competition law actions, including options for settlement.

3.8 Possible ways in which the OFT might be able to encourage direct redress in the context of our own investigations are also considered in this section.

Consistency of policy

- 3.9 As the number of private competition law actions increases, additional measures may be required to ensure that competition policy continues to develop coherently and consistently.

The following suggestion is considered:

- providing that the courts should 'have regard' to UK NCAs' decisions and guidelines when determining competition law issues in relevant cases.
- 3.10 The OFT's approach to intervention in private actions is also discussed in this section.

4 REPRESENTATIVE ACTIONS

- 4.1 As outlined in chapter 1, we consider that there would be merit in making changes aimed at facilitating a greater number of private competition law actions, not only for the benefit of potential claimants, but also in order further to promote a 'compliance culture' in the UK, and to ensure that public enforcement and private actions work well together.
- 4.2 One key issue for discussion is whether, and how, representative actions should play a part in an enhanced system. Currently, consumers and small and medium-sized businesses face particular difficulties in bringing private competition law actions in the courts on an individual basis. They have been reluctant to bring court cases on their own, either because they believe the process is too difficult or because the potential costs outweigh their own individual loss, even though the aggregate loss to consumers or business at large may be very significant. Increasing the availability of representative actions would help to address these issues, particularly given the economies of scale that may be realised.
- 4.3 It is important to note at the outset that representative actions are not the same as class actions. In a class action, a named claimant brings an action on behalf of a class to which he belongs and which is certified by the court. In a representative action, a body representing the interests of those harmed by an unlawful practice (the representative body) brings an action on behalf of those who have suffered loss. The key difference is that a representative action is brought by a body authorised to bring a representative claim based on pre-determined criteria. As explained below,¹⁵ this distinction addresses a number of concerns that have been raised about class actions.

¹⁵ See, for example, the discussion of the 'principal - agent problem' at paragraphs 4.34 - 4.35 below.

- 4.4 We would welcome comments on any aspect of the issues discussed below.

Possible action at EU level

- 4.5 The ability of groups of consumers and businesses collectively to seek redress for infringements of competition law is likely to make the threat of action all the more credible. This should encourage those who have breached competition law to seek to resolve claims made against them, as well as encourage compliance more generally. To ensure that there is an adequate level of protection throughout the EU, it may be appropriate for a Community instrument to require all Member States to ensure that there is an effective collective means (especially for consumers) to bring claims for breaches of competition law in the relevant Member State. The choice of the appropriate (effective) form of collective action could be left to the Member States.

Possible action at the domestic level

- 4.6 In the UK, some action has already been taken to reduce the difficulties faced by consumers in bringing private actions in competition law: under section 47B of the CA98, for example, specified bodies are permitted to bring representative follow-on actions in the CAT. However, no provision is currently made for representative follow-on actions to be brought on behalf of businesses.
- 4.7 With respect to individual standalone claims (which can currently be brought before the ordinary courts), it appears that the difficulties in doing so faced by potential claimants (particularly consumers and small and medium-sized businesses) have proved to be prohibitive in many instances. Standalone claims can, however, in addition to ensuring effective redress, provide an additional and more immediate corrective mechanism in markets affected by anti-competitive behaviour, since they can be brought before the conclusion of a (potentially lengthy) investigation by a competition authority, or in the absence of any investigation at all. For these reasons they should be facilitated.

- 4.8 In the light of these factors, it might be appropriate to allow standalone representative actions in competition cases to be brought on behalf of consumers and businesses before the ordinary courts.¹⁶ The economies of scale that are gained as a result of pursuing representative (rather than individual) standalone actions may help to address some of the concerns potential claimants have with respect to the cost of bringing individual actions. Although the representative body will often bear the cost of a representative action brought on behalf of consumers, the cost to that body of obtaining compensation for any given represented party will decrease as the number of represented parties increases. Where the body represents businesses, there are likely to be ways in which the costs of pursuing the action can be spread proportionally among the persons represented.
- 4.9 In addition, effective and efficient case management by the courts is capable of ensuring that a balance is struck between the need to encourage an appropriate level of redress and the desire not to introduce any measures that might result in courts and businesses being burdened with ill-founded actions.

Representative actions: some key features

- 4.10 The key features of a system of representative actions could include the following:
- a statutory basis for representative standalone actions, and extension of the current provisions for follow-on representative actions to include claims brought on behalf of businesses

¹⁶ The Department of Trade and Industry recently put forward proposals for representative actions in the field of consumer law. For more details, please see *Representative actions in consumer protection legislation: consultation*, 12 July 2006, available at www.dti.gov.uk/consultations/page30259.html and the OFT's response to that consultation October 2006, available at http://www.offt.gov.uk/shared_offt/reports/offt_response_to_consultations/offt867.pdf.

- conferring representative body status (and the associated standing) by means either of designation by the Secretary of State, or permission of the court
- effective and flexible case management powers for the courts, and
- the introduction of one or more models for identifying categories of claimant in each case (for example, providing that a representative action may be brought on behalf of consumers at large,¹⁷ or alternatively that a representative action may only be brought on behalf of named consumers).¹⁸

4.11 A further, related, possible means of facilitating lower value claims could be to allow county courts at Chancery District Registries in England and Wales to hear smaller individual competition cases. It is not envisaged that this would include representative actions.

Each of these key features is discussed in further detail below.

A statutory basis for representative actions

4.12 Currently, the only statutory basis for representative actions in competition law is section 47B of the CA98. This provision is limited in scope and nature, allowing bodies specified by the Secretary of State to bring follow-on actions on behalf of consumers before the CAT. We believe that, subject to appropriate safeguards, representative actions should be permitted to a greater extent, and that there should also be more scope to obtain authorisation as a body permitted to bring claims.

4.13 The scope for representative actions could be extended by allowing duly authorised bodies to bring both follow-on and standalone actions, on behalf of consumers or businesses, as appropriate. A statutory basis

¹⁷ That is, individuals, having being properly informed, must assert their wish not to be bound by the outcome of the litigation.

¹⁸ That is, individuals, having being properly informed, must assert their wish to participate in the proceedings.

would be needed for standalone representative actions. The same applies for all follow-on representative actions in the ordinary courts, and claims brought on behalf of businesses before the CAT (as section 47B of the CA98 only deals with representative actions on behalf of consumers).

Representative body status

- 4.14 A representative action system will only operate successfully if the bodies permitted to bring those actions are credible, reputable, and committed to acting in the interests of those they represent. We envisage that standing to bring a representative action would only be conferred where a body is either designated by the Secretary of State on an ongoing basis, or is granted permission by the courts for a particular case or cases. Bodies that might be interested in obtaining permission for a particular case or cases could include central or local government purchasing agencies or groups, such as those whose members have suffered from the operation of cartels in the construction sector, and representative trade groups.
- 4.15 Bodies that are designated to bring representative actions on an ongoing basis must be subject to appropriate safeguards and should be required to meet objective, transparent and non-discriminatory requirements (similar to those that have already been drawn up for bodies specified for the purposes of section 47B of the CA98 (*Claims on behalf of consumers - Guidance for Prospective Specified Bodies*)).¹⁹

¹⁹ See www.dti.gov.uk/consumers/enforcement/group-claims/index.html. In brief, the criteria are (i) the body is so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity, (ii) the body is able to demonstrate that it represents and/or protects the interests of consumers. This may be the interests of consumers generally or specific groups of consumers, (iii) the body has the capability to take forward a claim on behalf of consumers, and (iv) the fact that a body has a trading arm will not disqualify it from being able to bring consumer group claims, provided that the trading arm does not control the body, and any profits of the trading arm are only used to further the stated objectives of the body.

- 4.16 Similarly, the criteria to be applied by the courts when authorising bodies to bring representative actions should be objective, transparent and non-discriminatory, and could be laid down for these purposes in secondary legislation.
- 4.17 The OFT stated in its response to the Green Paper that 'the OFT may itself wish to apply to the Secretary of State to become a specified body in due course' and observed that 'The OFT believes that it fulfils the criteria set out in *Claims on behalf of Consumers - Guidance for Prospective Specified Bodies*, published by the Department of Trade and Industry'. For the time being, however, the OFT believes that its resources should be concentrated on public enforcement, the interface between public enforcement and private actions and broader policy issues in the field of private actions and that other bodies should be given the opportunity of developing their expertise in this area.

Effective and flexible case management powers for the court

- 4.18 Given the costs, diversion of management time and chilling effects that can arise from actual or threatened ill-founded litigation, it is important that courts exercise their case management powers robustly. The UK courts (those of England and Wales, in particular) already have strong case management powers. English courts can, for example, strike out statements of case disclosing no reasonable grounds for bringing (or defending) the claim²⁰ and apply a costs sanction. They can also take measures to ensure that parties focus on the key issues when developing and presenting their cases and to ensure that disclosure does not become excessively burdensome. Given the complexity of claims for breach of competition law, such powers may be particularly important in the present context.
- 4.19 Although it is likely that some new or additional powers would need to be conferred expressly upon the courts for the purposes of dealing with certain aspects of representative actions in competition law, it is worth

²⁰ See, in England and Wales, Rule 3.4(2) of the CPR.

noting that the courts in England and Wales already have experience of managing a form of collective action - group litigation orders are available in the courts in England and Wales under Part 19 of the CPR.²¹ Accordingly, it appears that the courts in England and Wales, in particular, are likely to be well equipped to deal with representative actions.

Identification of claimants: models for representative actions

4.20 There are, in essence, two basic models for bringing an action on behalf of a category of claimant. The first involves claims being brought on behalf of named individuals, who have given their express consent to be bound by the outcome of the litigation. This is the model which has been adopted in the UK for representative follow-on actions brought in the CAT on behalf of consumers under section 47B of the CA98. The second allows claims to be brought on behalf of consumers at large (that is, named and as yet unnamed individuals). If an individual does not wish to be bound by the outcome of the litigation, he must assert this wish within a specified period.

4.21 The arguments for and against each of these models for representative actions are examined below, focusing on the following areas:

- whether claimants should be required expressly to state that they wish to participate in a representative action
- the effect of each model on business compliance with competition law
- consideration of economies of scale versus the increased complexity of representative actions

²¹ Group litigation proceedings do not currently exist in Scotland. However, the OFT understands that it is possible for individual rights of action to be assigned, which may be sufficient to allow for a designated body to make a representative action within the current rules of civil procedure, provided the designated body is given legal powers to take on such assignments and pursue such cases in court. Primary legislation may be required to effect these changes.

- how claimants may be identified through effective publicity, and at what stage of the proceedings, and
- alignment of incentives of claimants and representative bodies, and how compensation funds might be managed.

Participation and choice

- 4.22 It can be argued that, as a matter of principle, it should be for the individual to decide whether he wishes to become involved in litigation and, if so, who should represent him. This consideration militates in favour of a system whereby claims can be brought on behalf of named consumers only.
- 4.23 On the other hand, it can be argued that a system based on claims by named consumers only may fail to protect consumers' rights in other ways. Although the aggregate loss to consumers at large in a particular case may be very significant, it may be that an individual's loss is so small that even once he is aware of a potential claim, he does not take steps to join a representative action to recover his loss. On that basis, a representative action may not be brought at all, in which case the harm to consumers will not be compensated, despite the fact that the infringing undertakings have unlawfully made a profit to the detriment of their customers and consumers. This consideration militates in favour of a system whereby claims can be brought on behalf of consumers at large.
- 4.24 It has been suggested that the latter model might potentially raise legal issues under the Human Rights Act 1998 (for example, the right to a fair trial under Article 6 of the European Convention on Human Rights). However, provided that the individual had a real opportunity to assert his wish not to be bound by the outcome of the litigation, such arguments may not have much force.

Business compliance

- 4.25 The effect of representative actions on business compliance with competition law more generally is also relevant to consideration of the various models. If, under a system in which an action may only be brought on behalf of named individuals, an action does not proceed at all (or proceeds on behalf of only a small minority of those harmed by the anti-competitive behaviour), an infringing undertaking will not be held to account for compensation that reflects either the harm caused to all the consumers affected by its anti-competitive behaviour, or its 'ill-gotten gain' from the infringing conduct.
- 4.26 A system, on the other hand, which maximizes the number of individuals on whose behalf an action may be brought also maximizes the financial risks for businesses that breach competition law, which may find themselves having to pay damages to all those who have been harmed, and not just those who were sufficiently motivated (or otherwise able) to pursue a claim.²²

Economies of scale or increased complexity?

- 4.27 Economies of scale may be realised when claims are aggregated, both for the courts (since a single judge or panel can consider all of the issues) and for claimants (whose average costs of representation will decrease as the number of fellow claimants increases). These economies of scale are most likely to be preserved in a system where claims may be brought on behalf of consumers at large. Where actions may be brought on behalf of named individuals only, the number of claimants may be so low that a representative action is not viable.

²² At the same time, once the claim has been disposed of (whether by settlement or at trial) the business affected will at least know what its cost (exposure) to the particular breach of competition law has been. It will not be subjected to further instances of litigation, possibly years after the event.

4.28 At the same time, it may be argued that aggregating a greater number of claims could in some cases make the issues for consideration more complicated and make greater demands of individual judges.²³ Whilst it is true that quantification of damages may be more complex, it would seem possible for effective, fair and reasonable systems to be devised in order to calculate damages in the aggregate without the necessity to prove the individual loss suffered by each individual consumer.²⁴

Publicising representative actions

4.29 Any representative action, whether brought on behalf of named individuals or consumers at large, must enable effective identification of claimants.

4.30 How easy it is to do this will depend on the circumstances. In many cases, businesses will have records of the persons to whom they have sold goods or services. Such information could be made available to representative bodies and their advisers through pre-action disclosure. In that case, customers could be identified and contacted directly. Identifying indirect purchasers or final consumers may be more difficult, although it might be possible to reach them through appropriately placed advertising.

4.31 The difficulty of identifying potential claimants at the outset is a particular issue for the representative action model based on claims on behalf of named individuals, since if a sufficient uptake is not achieved at the start, an action may not be viable at all. There may also be practical difficulties in reaching all individual claimants before the

²³ One way to reduce the impact of this would be to allow the judge to require that claims are brought separately in appropriate cases.

²⁴ For instance, in a cartel case, damages may be proved and assessed in the aggregate by statistical or sampling methods, or by the computation of illegal overcharges per unit of output multiplied by the total market output. In order to measure the loss accurately, the value of any lost sales would need to be added to this figure.

commencement of the action because, for example, pre-action disclosure has not been sought or because of limitation periods.

4.32 Under this model, it may, therefore, be appropriate to consider a variant which would give additional consumers a further opportunity to join the action at a later stage. Under this variant, the court could direct that the issue of liability and, possibly, certain issues relating to causation and the quantification of damages be dealt with before the final hearing on quantum.²⁵ Following a judgment declaring the liability of the defendant(s) or establishing the amount of the overcharge per unit of output, the representative action would be further publicised to allow more claimants to join it.

4.33 This might also allow proceedings to be initiated more swiftly, given that there would no longer be a need to identify individual claimants at the outset in sufficient numbers to make the action viable. In addition, a declaration of liability and/or findings relating to certain elements of causation and quantum early on in the proceedings would make it easier for the parties to resolve the claim effectively once the deadline for more individual claimants to join the action had expired.

Alignment of incentives

4.34 It has been suggested that the 'principal - agent problem' may be an issue in a system in which a collective action is brought on behalf of consumers at large. This stems from concerns that have been expressed in relation to class actions: that they are sometimes run in the interests of the law firm (the agent), rather than the claimants (the principals).

²⁵ In a follow-on action, decisions of the OFT, concurrent regulators and the European Commission are binding as to the issue of whether an infringement has occurred under section 58A of the CA98 or, as appropriate, Article 16(2) of Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4 January 2003, page 1.

4.35 The relationship between the principals and the agent is closer in a system where collective actions are brought on behalf of named consumers than in one where the agent acts on behalf of an unidentified class. However, there is an important distinction between class actions and representative actions: in a representative action, the representative body does not have a pecuniary interest in the outcome and acts in a quasi public interest capacity. It ought therefore to be able to act as an effective control over the conduct of the litigation in the same way as any other client. Appropriate criteria for designation or permission should also ensure that representative bodies are able and willing genuinely to act in the interest of the principals.

Fund management and 'cy pres'

4.36 A model in which a representative action may be brought on behalf of consumers at large requires an effective system for the management and distribution of the proceeds arising from any such action.

4.37 If the proceeds are not completely distributed to individual consumers, this raises the question of how to dispose of the remaining funds. One option would be to allow the court to direct how the fund should be used for the benefit of consumers falling within the category (or, failing that, consumers more generally). This is generally known as cy pres. The fund could, for instance, be used for consumer education or research or to finance other representative actions. Public bodies may be able to make suggestions to the court as to how those cy pres powers should be used. The extent of courts' involvement in management (bearing in mind effective use of resource) and the costs of managing such funds would need to be considered carefully.

Individual actions in county courts in England and Wales

4.38 Currently, all claims arising in England and Wales pleading a breach of EC or UK competition law must be issued in or transferred to the High Court and, unless they come within the scope of Rule 58.1(2) of the

CPR (in which case they are assigned to the Commercial Court), they are assigned to the Chancery Division.²⁶

- 4.39 There may be merit in revisiting this provision. Lower value claims that could be issued in the county court have to be issued in the High Court, potentially leading to higher costs and arguably discouraging claimants from commencing private actions.
- 4.40 It might facilitate these lower value claims (as an alternative to the possibility of a representative action) if individual claims could be issued in county courts at Chancery District Registries according to the ordinary rules.²⁷ On the application of either of the parties or on the motion of the court, either the county court or the High Court would have the power to order that the claim be transferred to the High Court if the claim raises complex competition law issues (where it could be heard by more senior and expert judges). The current provisions on transfer of proceedings between county courts and the High Court may already be sufficient for these purposes.²⁸
- 4.41 We do not envisage that this would involve representative actions being brought before county courts.

²⁶ See *Practice Direction - Competition law - Claims relating to the application of Articles 81 and 82 of the EC Treaty and Chapters I and II of Part I of the Competition Act 1998* and Rule 30.8 of the Civil Procedure Rules. Under section 16(1) of the EA02, the Lord Chancellor may by regulations make provision enabling the court to transfer to the CAT for its determination so much of any proceedings before the court as relates to an 'infringement issue' and to give effect to the determination of that issue by the CAT.

²⁷ There are currently eight Chancery District Registries: Birmingham, Bristol, Cardiff, Leeds, Liverpool, Manchester, Newcastle-upon-Tyne, and Preston. High Court or Circuit Chancery judges sit regularly at all of these centres. See the Chancery Guide, October 2005, Chapter 12, available at www.hmcourts-service.gov.uk/cms/files/chancery_guide_2005.pdf?bcsi_scan_A2018E0826464712=0&bcsi_scan_filename=chancery_guide_2005.pdf.

²⁸ See County Courts Act 1984, sections 41 and 42, and Rule 30.3 of the CPR.

5 COSTS AND FUNDING ARRANGEMENTS

- 5.1 One of the major obstacles to bringing private actions in competition law is the cost of such actions and the difficulties and risks in funding them. Broadly, there are two dimensions to this issue. First, a claimant will have to incur significant disbursements (for example, court fees and payments to experts) to start and progress the action. Second, if his claim fails, the claimant is likely to have to pay the other party's legal costs.²⁹ This section considers two related areas where changes could be made to help overcome these costs and funding difficulties. First, we consider how a 'funding package' could be designed to enable under-resourced claimants to plan and progress claims effectively. Second, we consider how parties might be incentivised to conduct litigation efficiently by restricting their ability to recover costs exceeding a court-approved limit from the other side. This may, in turn, reduce the risk to professional funders and increase the availability of litigation funding.
- 5.2 We would welcome comments on any aspect of the issues discussed below.

Funding

- 5.3 One way to alleviate the funding problems and financial disincentives faced by claimants in bringing private competition law actions could be to improve and widen the available means of privately funding civil actions and insuring against unfavourable outcomes. Currently, a claimant lacking the resources or willingness to bear all the risk himself may fund litigation through a combination of some or all of the following:

²⁹ If a claim is allocated to the small claims track, as a general rule the court may not order a party to pay a sum to another party in respect of that other party's costs, fees and expenses, including those relating to an appeal: Rule 27.14 of the CPR.

- a conditional fee agreement: solicitors and counsel agree to receive no payment or less than normal payment if the case is lost but normal or higher than normal payment if the case is won
- after-the-event insurance: the claimant can take out an insurance policy against the risk of losing the case. If the case is lost, the claimant's disbursements and the other party's costs are covered by the insurance. However, it is currently not easy for claimants in competition law cases to find a suitable after-the-event insurance policy, and
- loans: the claimant may take out a loan to fund the disbursements, the expert witnesses' fees, and the premium for the after-the-event insurance. The loan may be on terms that it is not repayable in the event that the claimant loses. The interest on the loan is not recoverable from the other party and may be deducted from the damages recovered. If the case is ultimately lost and the claimant is unable to pay the other party's costs, the professional funder is only liable for the costs of the opposing party to the extent of the funding provided.³⁰

5.4 A combination of all three options, appropriately widened and strengthened, could help to alleviate the funding problems and financial disincentives faced by claimants in bringing private competition law actions. In this connection, the following issues would merit further consideration:

³⁰ *Arkin v Borchard Lines* [2005] EWCA Civ 655; [2005] 1 WLR 3055 at paragraph 38 et seq. The Court of Appeal recognised that '[s]omehow or other a just solution must be devised whereby on the one hand a successful opponent is not denied all his costs while on the other hand commercial funders who provide help to those seeking access to justice which they could not otherwise afford are not deterred by the fear of disproportionate costs consequences if the litigation they are supporting does not succeed.' In order to avoid a higher level of liability, the professional funder must 'leave the claimant as the party primarily interested in the result of the litigation and the party in control of the conduct of the litigation'.

Liability of professional funders

- 5.5 The extent to which a professional funder should be liable for the costs of the opposing party is an important issue. The market for the provision of funding helps to ensure effective access to justice. Liability for costs (albeit only to the extent of the funding provided) is likely to decrease the supply of funding for civil litigation. While in certain cases the professional funder will simply demand a higher share of the sums recovered to offset this increased risk, in some cases funding may become unavailable. A balance must be struck between the public interest in ensuring effective access to justice, and the interests of the defendants.

Conditional fees: percentage increases

- 5.6 Another key issue is whether the currently permitted percentage increase on normal fees is appropriate in all competition cases. Under a conditional fee agreement, solicitors and counsel may agree to receive no payment or less than normal payment if the case is lost but normal or higher than normal payment if the case is won. Currently, the percentage increase on the normal fees if the case is won can be no more than 100 per cent. Although this may be sufficient for the purposes of follow-on competition actions (or actions brought following the submission of a leniency application in, for example, the US), it may not be a sufficient incentive for lawyers to take well-founded, standalone cases.
- 5.7 An alternative to the current conditional fee system would be to allow a percentage increase of more than 100 per cent. Questions which would arise are whether all of that percentage increase should be recoverable from the losing party, or whether the claimant should meet some of that expense from the damages recovered. One option might be to allow the percentage increase up to 100 per cent to be recoverable from the losing party and any further increase to be met from the damages recovered. This would increase the incentives for lawyers to

take cases on a conditional basis without imposing disproportionate burdens on defendants.

- 5.8 As is currently the case, the court would retain control over the increase in order to avoid unreasonable or disproportionate outcomes. The court would have the power to reduce both the percentage increase recoverable from the losing party and, on its own motion if appropriate, the further increase agreed between the parties.
- 5.9 One additional issue is whether the court should exercise this power at the beginning or at the end of the proceedings. Where the decision as to whether to 'approve' the percentage increase agreed between the lawyer and the client is made at the start of the proceedings, the court could take into account the size and complexity of the litigation, the level of risk and public policy considerations, among other things. This option would give lawyers and parties certainty at the beginning of the proceedings (or, possibly, even before proceedings are commenced). Where the percentage increase is determined at the end of the proceedings, the court could also take into account the quality of the work done, and (possibly) the relationship between the fees and the amount of damages recovered.

Discretion as to costs and costs-capping

- 5.10 In UK courts, costs³¹ usually 'follow the event', that is, the successful party can recover the costs he has incurred from the losing side. This is generally fair and efficient. The successful party is not penalised simply because an (ultimately unsuccessful) action was brought against him. It also provides a discipline against the bringing of ill-founded cases.
- 5.11 However, courts do have wide discretion to depart from a strict application of the 'costs follow the event' rule and make a costs order which is fair and reasonable in the circumstances of each case. This

³¹ In Scotland, costs are referred to as 'expenses'.

discretion is available in competition cases, in which the outcome often depends on highly complex factual and/or economic evidence. Although the availability of this discretion may not be sufficient to deal with all barriers (particularly as the costs order can only be made ex post), a flexible operation of the 'costs follow the event' rule could reduce the disincentives to the bringing of well-founded claims.

- 5.12 In order to ensure predictability and to cap liability at a level that does not deter well-founded claims, there may also be scope for a structured use of costs-capping orders. In England and Wales, courts have jurisdiction to make costs-capping orders under section 51(3) of the Supreme Court Act 1981 and Rule 3.1(2)(m) of the CPR.³² These costs-capping orders are made at an early stage of the proceedings. The order may cap the parties' base costs³³ for the purpose of liability for costs as between the parties. The order may also go further in certain circumstances and cap the total amount of recoverable costs, including any percentage increase.³⁴
- 5.13 Costs-capping orders are tailored to the circumstances of the case and may be varied on application by either party. The claimant's and the defendant's capped costs need not be the same (for instance, the claimant's liability for the defendant's costs may be capped at a lower level than the defendant's liability for the claimant's costs).
- 5.14 In terms of timing, costs-capping orders should ideally be made at an early stage of the proceedings.³⁵ If the claimant's lawyers are acting under a conditional fee agreement, the court could at that stage also prescribe the percentage increase recoverable from the other party. If the conditional fee agreement provides for a further percentage increase

³² See *AB v Leeds Teaching Hospitals NHS Trust* [2003] EWHC 1034 (QB), [2003] 3 Costs LR 405.

³³ Base costs are the costs without any percentage increase recoverable under a conditional fee agreement.

³⁴ *King v Telegraph Group Ltd* [2004] EWCA Civ 613, [2004] NLJR 823.

³⁵ The current practice in England and Wales is for an application to be made after the parties have filed an allocation questionnaire under Rule 26.3 of the CPR.

between the lawyer and the client, the court could rule on whether the additional percentage increase should be confirmed or reduced.

- 5.15 The financial position of the claimant and the likelihood that he would discontinue the proceedings if the order is not granted are circumstances that the court would be likely to take into account when deciding whether to make the order and prescribing the total amount which the defendant, if successful, will be able to recover. More generally, where the choice is between allowing anti-competitive behaviour to continue and capping the costs liability of claimants of small financial means to facilitate their access to justice, it is likely to be in the public interest for the latter to occur.
- 5.16 There may be merit in codifying the criteria and the procedure for costs-capping orders, so as to provide greater guidance on the circumstances in which an order will be granted and the likely contents of any such order.³⁶ However, it would be essential to retain flexibility and a wide discretion to tailor the order to the circumstances of individual cases.

³⁶ In England and Wales, this could be done in a Practice Direction.

6 EVIDENTIAL ISSUES AND APPLICABLE LAW

6.1 Claimants may face a number of significant difficulties in obtaining information to enable them to bring private actions in competition law, in establishing their loss, and (in cross-border cases) identifying the law applicable to their claim. This chapter discusses a number of options aimed at improving this situation. It focuses on:

- issues of information asymmetry, courts' powers to order disclosure, and the OFT's approach to disclosure of information we hold
- the status of the decisions of other EU NCAs before the UK courts
- where the burden of proof in respect of 'passing-on' of loss suffered by the claimant should lie, and
- the law applicable to claims involving cross-border issues.

6.2 We would welcome comments on any aspect of the issues discussed below.

Information asymmetry

6.3 It is widely acknowledged that one problem faced by (especially) consumers and small and medium-sized businesses in bringing private competition law actions is obtaining access to the relevant information to enable the claim to be brought. This is likely to be a particular issue in standalone actions, in the absence of a pre-existing infringement decision.

6.4 As explained in the Green Paper, 'information asymmetry exists when one party (usually the defendant) has in its control or has access to more evidence relating to a given claim than the (potential) claimant.' The cost and difficulty of obtaining all the relevant evidence, particularly when it relates to the competitive conditions of the market or originates from third parties, is likely to hinder a potential claimant, who bears the

