

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/oft_response_to_consultations/oft867.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

burden of proving the infringement (in a standalone action, at least) as well as causation and quantum.

6.5 English law already has wide disclosure provisions.³⁷ The aim is to place all the relevant evidence before the court to enable it to do justice as between the parties. For this reason, information asymmetry does not appear to be as significant a problem in the UK as it may be in some other jurisdictions. In particular, in England and Wales:

- there is provision for pre-action disclosure orders on the application of a prospective party against another prospective party³⁸
- once litigation has commenced, the parties have a duty of disclosure of relevant documents on which each party intends to rely, together with documents which either adversely affect his own case, adversely affect another party's case or support another party's case (standard disclosure)³⁹
- there is provision for third party (or 'non-party') disclosure once litigation is under way.⁴⁰ This allows parties to the litigation to obtain evidence from third parties, and
- courts have flexible powers to ensure the adequate protection of confidential information.

³⁷ In Scotland, litigation proceeds on the premise that no information or documentation must be disclosed to the opposing party unless it is specifically required by the Rules of Court or by court order. The procedure for seeking documents is known as 'recovery' and is sought by application to the court. The court will authorise recovery of documents, either from another party to the action or from a third party, only to the extent they are clearly relevant to the matters that have been put in issue in the written pleadings. Applications may be opposed on the grounds of excessive breadth (that is, that the request amounts to a 'fishing expedition') as well as relevance and confidentiality.

³⁸ Rule 31.16 of the CPR.

³⁹ Rule 31.6 of the CPR.

⁴⁰ Rule 31.17 of the CPR.

Information held by the OFT

- 6.6 In some instances, the OFT will hold relevant information that might assist a court in determination of a private competition law action. The question arises as to how far this information can, and should, be disclosed, and at what stage.
- 6.7 There are legal constraints on voluntary disclosure of information by the OFT. 'Specified information' (which is likely to include the vast majority of information in the OFT's possession that relates to a particular investigation under the CA98) must not be disclosed unless disclosure is permitted under Part 9 of the EA02. There are a number of 'gateways' for disclosure, but no generally applicable 'gateway' for disclosure for the purposes of facilitating private actions in the field of competition law. The prohibition on disclosure would not apply where the OFT is otherwise obliged to disclose, for example if ordered by the court.
- 6.8 As mentioned above, the CPR provides for third party disclosure when litigation is underway. Disclosure may be ordered when a person who is not a party to the proceedings (which includes the Crown) appears to the court to be likely to have in his possession, custody or power any documents which are relevant to an issue arising out of a claim pending before the court. The court may make an order only where the documents of which disclosure is sought are likely to support the case of the applicant or adversely affect the case of one of the other parties and disclosure is necessary in order to dispose fairly of the claim or to save costs.⁴¹
- 6.9 Given, however, that there is already provision for disclosure between parties to litigation, that must be the first port of call for claimants (in addition to what may already have been published in any OFT decision). It is only if there are difficulties in disclosure and/or there is relevant evidence on the OFT's files that is necessary for the case and cannot be

⁴¹ On third party disclosure, see Nazzini, *Concurrent Proceedings in Competition Law: Procedure, Evidence and Remedies* (OUP: Oxford, 2004), paragraphs 8.111 - 8.125.

obtained through the usual channels, that additional requests to the OFT may be appropriate.

- 6.10 We will consider any applications for third party disclosure carefully, but will resist them if we consider that any resulting disclosure order would be contrary to the public interest (by, for instance, unduly interfering with the OFT's exercise of its functions). In particular, we will take all possible steps to protect from disclosure leniency documents (that is, documents created for inclusion in or to support an undertaking's leniency application).⁴² We will also oppose third party disclosure applications in the form of a 'fishing expedition'. This could be the case if, for instance, the application asked for disclosure of all documents submitted to the OFT by a person or all documents submitted in support of a leniency application, without further particularisation.

Status of the decisions of other EU NCAs

- 6.11 In the UK, infringement decisions by UK NCAs and the European Commission are (unless overturned on appeal) binding on the court in actions for damages or another sum of money arising out of an infringement of the UK and EC competition prohibitions.⁴³ This has the advantage that evidentially complex cases are not re-litigated before the courts when the parties have already had the opportunity to exercise their rights of defence on issues of infringement. This increases certainty and saves costs in follow-on actions.
- 6.12 Public enforcement action for breaches of Articles 81 and 82 may also be taken by another NCA in the EU. Decisions made by these bodies are not, however, binding on UK courts. An extension of the provisions relating to the binding effect of NCA decisions would assist in further promoting private actions, by providing increased legal certainty and saving costs. It would also help to provide a level playing field - it would put UK consumers harmed by multi-jurisdictional anti-competitive

⁴² On leniency, see the discussion at paragraphs 7.15 - 7.16 below.

⁴³ Section 58A of the CA98 and Article 16(2) of Regulation 1/2003.

behaviour ultimately condemned by a foreign NCA (as a result of, for example, case allocation within the ECN) on a more equal footing with (i) consumers harmed in a jurisdiction where the NCA has taken a decision against the multi-jurisdictional practice if the decision is binding on the courts in that jurisdiction, and (ii) consumers harmed in the UK by a similar practice in respect of which a UK NCA has taken a decision.

6.13 There appear to be two main options for providing for this binding effect: doing so on an EU-wide basis, or alternatively on a reciprocal basis.⁴⁴

EU-wide alignment

6.14 The first option would be to provide for the binding effect of the finding of infringement of Article 81 or 82 made in a decision by any NCA (or courts following an appeal) in courts in the EU as against the addressees of the decision. This would be in line with the current position as regards decisions by UK NCAs under the CA98.

6.15 It may be arguable that courts would find themselves unduly constrained by decisions taken in other Member States on the application of Articles 81 and 82. However, the UK courts are already bound by decisions of UK NCAs and the European Commission. It would appear natural that decisions of the other NCAs forming part of the ECN and applying Articles 81 and 82 should have the same status. The allocation and consultation mechanisms within the ECN should ensure that there would not be conflicting decisions potentially applicable to the same behaviour.⁴⁵

6.16 There may be difficulties in achieving this result unilaterally due to the lack of reciprocity and the fact that this may confer a status on

⁴⁴ We have not considered models providing for the reversal of the burden of proof, since they would not achieve the objective of saving costs (as the issue of infringement would have to be re-litigated in any event).

⁴⁵ See the *Commission Notice on cooperation within the Network of Competition Authorities*, OJ C 101, 27 April 2004, page 43.

decisions of certain NCAs which is not presently accorded to them in their own legal system. If this option is pursued, action at EU level to provide for the binding effect of decisions in each Member State might have to be considered.

Reciprocal alignment

6.17 The second option would involve making decisions by NCAs binding in other Member States based on the principle of reciprocity. In order for a decision in State A to be binding in State B, two pre-conditions would have to be fulfilled: (i) decisions of the NCA in State A are binding on the courts of State A, and (ii) decisions of the NCA in State B are binding in State B. This option would be more respectful of national law as the choice as to the effects of the decision would be left to the national legal system. This proposal also recognises that making decisions of NCAs binding could have further ramifications within a national legal system - for instance, a Member State might consider it necessary to adjust the standard of review applicable to decisions of the NCA or reconsider the relationship between public law and private law liabilities. On the other hand, this proposal would not provide for an EU-wide level playing field.

Indirect purchaser standing and 'passing-on'

6.18 The extent to which there should be any limitation on indirect purchaser standing is one of the most controversial issues in relation to private actions in competition law. There is increasing consensus that the focus

of competition law should be on protecting consumer welfare. In the light of this, it is likely to be inappropriate in policy terms to deny consumers and other end-users the right to sue for damages arising from breach of the competition rules.⁴⁶ In many instances, it is consumers and end-users who suffer the effects of infringements, as higher prices are reflected along the chain of distribution.

- 6.19 In addition, there are cases suggesting that EC law itself requires that all persons harmed by an infringement of Articles 81 and 82 should be able to recover their loss provided that the other requirements to obtain compensation are met.⁴⁷ At the same time, national courts can take steps to ensure that claimants are not unjustly enriched.⁴⁸
- 6.20 It is also unclear whether a limitation on potential claimants to include only direct purchasers would achieve any of the intended benefits in terms of incentives to bring private actions - direct purchasers may, for example, share with their suppliers the benefits of an overcharge or may attach a greater importance to maintaining good commercial relations with their suppliers. These considerations would be less likely to apply to indirect purchasers.
- 6.21 For all of these reasons, any limitation on the standing of consumers and other end-users would not seem to be appropriate.

⁴⁶ There has been a considerable backlash in the United States against the ruling of a majority of the US Supreme Court in *Illinois Brick Co v Illinois*, 431 US 720 (1977), pursuant to which claims by indirect purchasers were precluded. A majority of US states have now enacted '*Illinois Brick* Repealer' statutes to preserve indirect purchasers' rights to sue in state courts. In many of those states, the Supreme Court's earlier majority ruling in *Hanover Shoe v United Shoe Mach*, 392 US 481 (1968), pursuant to which the passing-on defence was excluded, has also been overturned. In its *Report and Recommendations*, April 2007, the Antitrust Modernization Commission recommended that Congress overrule the Supreme Court's decisions to the extent necessary to allow both direct and indirect purchasers to recover. See www.amc.gov/report_recommendation/toc.htm.

⁴⁷ Case C-453/99 *Courage Ltd v Bernard Crehan* [2001] ECR I-6297, paragraphs 26 - 28 and Case C-295/04 *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA* [2006] ECR I-6619, paragraphs 59 - 61.

⁴⁸ *Vincenzo Manfredi v Lloyd Adriatico Assicurazioni SpA*, paragraph 94.

6.22 It is, however, important that 'passing-on' does not become a powerful shield for defendants to escape liability and, as a result, a disincentive for direct or indirect purchasers to bring an action. To this end, we propose the following model as a simplification and refinement of the model suggested in our response to the Green Paper.⁴⁹ The model relies on three simple principles: (i) all persons harmed by cartels and other anti-competitive practices should have standing to bring an action, (ii) the defendant should only be liable for the loss he (individually or jointly with others) caused to each and every person who has suffered loss, and (iii) the burden of proof in respect of 'passing-on' should always lie with the defendant. Under this model, the claimant must prove that he has suffered loss. It is open to the defendant, however, to prove that the claimant mitigated the loss by passing on the whole or part of the overcharge to downstream purchasers.

⁴⁹ See footnote 2.

6.23 The model would operate as follows.

S is a supplier which has entered into a cartel. The cartel has resulted in increased prices. W is a wholesaler which has purchased goods from S while the cartel was in operation. K is a customer of W, and C is a consumer or other end-user to whom K has resold the goods.

W would be entitled to recover damages from S to the extent that it has suffered loss. It would be open to S to prove on the balance of probabilities that W has passed on the overcharge in whole or in part to K. Even if W had passed on the entire overcharge, it may still be able to show that it has suffered loss as a result of a decline in sales.

If S were sued by K, it would be open to S to prove that K has passed on the overcharge in whole or in part to C. Even if K had passed on the entire overcharge, it may still be able to show that it has suffered loss as a result of a decline in sales.

C would be able to recover to the extent that it could prove that it had suffered loss. No passing-on defence would be available to S, as C does not have any customers to whom C could have passed on the overcharge.

Applicable law

6.24 An important issue in competition cases involving the application of Articles 81 and 82 is to identify the law applicable to the determination of the conditions of liability, causation, and quantum. Only the issue of infringement will be determined by EC law. Applicable law is being discussed generally at a European level in the context of the proposed regulation on the law applicable to non-contractual obligations ('Rome II').⁵⁰

⁵⁰ 2003/0168 (COD).

- 6.25 In general, the law applicable to a non-contractual obligation arising out of a restriction of competition should be the law of the country where the market is or is likely to be affected. However, as regards competition infringements affecting the market in more than one country, this rule may require several different laws to be applied by the court to the same case, raising the costs of private actions and making the outcome less predictable.
- 6.26 Any rule applicable to cross-border competition claims must deal fairly with a complex situation. We are concerned to achieve predictability, fairness to the parties, and consistency and efficiency in adjudication of cross-border disputes while having due regard to national interests. It may therefore be appropriate to provide that, in cases where the restriction of competition affects, or is likely to affect, the market in more than one country, the person seeking compensation for damage who brings an action in the court of the domicile of (one of) the defendant(s), may instead choose to base his claim on the law of the court seised.

7 EFFECTIVE CLAIMS RESOLUTION AND THE INTERFACE WITH PUBLIC ENFORCEMENT

7.1 In many cases, early resolution of competition claims by means of a settlement made between the parties, whether or not facilitated by a third party, will be a more desirable outcome, both for businesses and for consumers, than taking a case to court and trial. Settlement may avoid litigation altogether, and even if it does not, it significantly reduces costs, gives the defendants an opportunity to limit adverse publicity, and minimises the diversion of resources from productive activities to contentious matters. Settlement may also be desirable from a public interest viewpoint as it allows the courts to focus their resources on those cases where other methods of resolution have failed and litigation is the only means of resolving the differences between the parties.

7.2 We consider that mechanisms which facilitate effective claims resolution in competition cases should continue to be pursued and encouraged. A number of avenues may be available. In the following section we put forward the following specific suggestions for further discussion:

- introduction of a pre-action protocol for competition claims in England and Wales
- establishment of a Competition Ombudsman, and
- publication by the OFT of information for business and consumers on private actions, including settlement options.

7.3 The section goes on to consider the interface between public enforcement and private actions, in particular:

- how to safeguard the effectiveness of the leniency regime in the context of private actions, and

- how the OFT is exploring the issue of redress for those harmed by infringements in the context of the OFT's own investigations.

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

Pre-action protocol for competition claims in England and Wales

7.5 A key feature of our civil justice system is to encourage early exchange of information between the prospective parties to the proceedings so that the claim can be fully investigated and, if possible, resolved without the need for litigation. In England and Wales, this is achieved through a number of means, including pre-action protocols. (No pre-action protocols have been introduced to date in Scotland.) Pre-action protocols set out codes of good practice which parties should follow when litigation is being considered.

7.6 There is currently no pre-action protocol applicable to competition claims.⁵¹ We note that the Civil Justice Council is currently consulting on a consolidated pre-action protocol in England and Wales.⁵² If such a consolidated pre-action protocol is adopted, it would apply to competition cases. It may then be that, in the light of experience, it would be appropriate to introduce a specific annex for competition cases, alongside the annexes envisaged for other types of claim.

⁵¹ Existing pre-action protocols can be found at www.dca.gov.uk/civil/procrules_fin/menus/protocol.htm.

⁵² The consultation documents are available at www.civiljusticecouncil.gov.uk/1074.htm.

Competition Ombudsman

- 7.7 Consideration could be given to the establishment of a Competition Ombudsman, based on the Financial Services Ombudsman model.⁵³
- 7.8 The Competition Ombudsman would not be bound by legal rules applicable in the courts as to causation and quantum, but should be able to recommend that an infringing undertaking make a monetary payment (in such amount as the Ombudsman considers fair and reasonable to compensate the claimant for the loss suffered) or that the undertaking take such steps in relation to the claimant as the Ombudsman considers just and appropriate (whether or not a court could order those steps to be taken). In the absence of prior consent, the Ombudsman's view would be a recommendation only and would not bind the undertaking or the claimant - the option of bringing an action in the courts would remain.⁵⁴
- 7.9 We consider that this option is worthwhile exploring, but question whether there is a need or demand for such a scheme at a stage when private actions are still developing. If the general consensus is that this would be a viable proposal, the precise functioning of the scheme (including its interface with the OFT and public enforcement more generally, and how it would be funded) would need to be considered further, based on experience of other Ombudsman schemes in the UK and elsewhere.

Consumer and business information

- 7.10 In order to raise awareness of the possibility of private actions and the importance of settlement at an early stage, it may be appropriate for the OFT (and possibly other bodies) to undertake additional advocacy

⁵³ For a description of the Financial Services Ombudsman, please see www.financial-ombudsman.org.uk/default.htm.

⁵⁴ This is different to the Financial Services Ombudsman scheme, in which undertakings are bound by the Ombudsman's determinations.

activities, including publication of information of a general nature about private actions aimed at businesses and consumers that may be affected by breaches of competition law. Such information could, for example, help to raise awareness of how a competition law claim could arise and in what ways a competition law claim might be pursued (such as by way of a complaint to the competition authorities, by way of an approach to the infringing undertaking(s), or by issuing legal proceedings). It could also include information on the various options for settling claims.

Leniency

7.11 The OFT offers a leniency programme to businesses that come forward with information about a cartel in which they are involved.⁵⁵ Under the leniency programme, members of cartels may have their financial penalty reduced substantially, or they may be able to avoid a penalty altogether. To qualify for leniency, a business must cooperate fully with the OFT's investigation and stop their involvement in the cartel from the time they come forward.⁵⁶

7.12 The leniency programme is an essential tool in the investigation of cartels. If undertakings are discouraged from applying for leniency due to

⁵⁵ In the UK, leniency is available not only in respect of horizontal cartels, but also in respect of vertical price-fixing.

⁵⁶ Leniency applicants may qualify for immunity (that is, 100 per cent leniency) or for some lesser form of leniency. The OFT's practice distinguishes between three types of leniency. A 'Type A' case refers to the situation where an applicant is the first to come forward and there is no pre-existing administrative or criminal investigation. In such circumstances, the OFT grants full immunity from financial penalties automatically. A 'Type B' case refers to the situation where an applicant is the first to come forward and there is a pre-existing administrative and/or criminal investigation. Although full immunity remains available in a Type B case, the grant of such immunity is discretionary. 'Type C' describes the situation where an applicant is not the first to come forward and there is a pre-existing administrative and/or criminal investigation. In a Type C case, the OFT has discretion to grant a reduction of up to 50 per cent in the level of any financial penalties, but no more. For further information on leniency see *OFT's Guidance as to the appropriate amount of a penalty* (OFT423, December 2004) and *Leniency and no-action* (OFT803, July 2005).

the risk of private actions, it is likely that a smaller proportion of cartels will be uncovered.

7.13 We are strongly of the view that it is in the public interest to safeguard the effectiveness of the leniency programme, and that changes to the private actions system must not jeopardise that aim. In order to preserve the effectiveness of the leniency programme, whilst at the same time facilitating effective private actions, we consider that two guiding principles should be observed:

- when defending a damages claim, a leniency recipient (that is, an undertaking which has been granted leniency by the European Commission, the OFT or any other NCA in the EU) should, as far as possible, be in the same position as it would have been if it had not applied for leniency, and
- those who have suffered loss should not find it more difficult to obtain redress because one or more of the infringing undertakings has been granted leniency.

7.14 There are, broadly, three issues to consider in the context of leniency: disclosure, liability for damages, and contribution.

Disclosure

7.15 A claimant in a private competition law action may wish to seek disclosure and inspection of certain documents created for inclusion in or to support an undertaking's leniency application ('leniency documents'). Such documents may be in the possession of the (potential) defendant or a competition authority.

7.16 The OFT's views on possible disclosure of leniency documents were set out in detail in our response to the Green Paper.⁵⁷ We will consider intervening against applications for the disclosure of leniency documents in private actions and against applications for disclosure framed as requests for all documents submitted to the OFT in the context of a leniency application, without any further particularisation.

Liability for damages and contribution

7.17 Breaches of competition law may give rise to joint and several liability.⁵⁸ The issue here is whether incentives to comply could be increased and a

⁵⁷ The OFT's response to the Green Paper is available at http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/gp_contributions.html. The views we expressed on possible disclosure of leniency documents can be summarised as follows. In order to maintain the effectiveness of the leniency programme, a claimant should not be allowed to inspect leniency documents (that is, any documents created for inclusion in or to support an undertaking's leniency application) or use them for the purpose of civil litigation. Such documents could include, for example, the undertaking's corporate leniency statement, transcripts of interviews and witness statements. There should be no blanket exclusion of disclosing and inspecting pre-existing documents, as this would confer advantages in litigation that would not have been obtained but for the leniency application. However, it is necessary to prevent claimants seeking through disclosure the documents in the form submitted as part of a leniency application. Where leniency documents are provided to the other infringing undertakings to enable them to exercise their rights of defence, restrictions must be placed on the use to which those documents can be put.

⁵⁸ Joint and several liability can arise under English law, for example, where there is a breach of duty imposed jointly on two or more persons, where persons take 'concerted action to a common end' and in the course of executing that joint purpose any one of them commits a tort, or where persons' tortious acts combine to produce the same damage. Joint and several liability does not arise where two or more persons not acting in concert cause different damage to the same claimant. The practical effect of this for present purposes is that, where A, B and C enter into a cartel and a purchaser buys 50 per cent of his requirements from A and 50 per cent from B, the purchaser can sue not only A and B but also C for the whole of the overcharge on the products purchased from A and B (and any other damage caused to the purchaser by the cartel), despite the fact that the purchaser has bought nothing from C.

compliance culture encouraged through granting immunity recipients⁵⁹ some form of relief from joint and several liability.

7.18 We put forward two options for consideration. The first is the complete removal of joint and several liability for the immunity recipient. We consider that, in order to strike a proper balance between the public and private interests involved, it may be appropriate only for the immunity recipient to benefit from the removal of joint and several liability. The position of other leniency recipients⁶⁰ would be unaffected. The second would be to allow claimants to bring an action against an immunity recipient under normal principles of joint and several liability, whilst empowering the court to allow the immunity recipient, in turn, to seek contributions of up to 100 per cent from non-leniency recipients.⁶¹

7.19 The first option is less advantageous to the claimant. Joint and several liability is a safeguard for the claimant, especially if the other infringing undertakings are insolvent or are domiciled outside the EU and have no branch/subsidiary and assets in Europe. Removal of joint and several liability should not, therefore, be permitted where the other infringing undertakings have insufficient financial resources to meet the claim in full.

⁵⁹ An immunity recipient is an undertaking which is granted immunity (that is, 100 per cent leniency) from any financial penalty for breach of Article 81 by the OFT, the European Commission, or an EU NCA or an undertaking which is granted immunity from any financial penalty for breach of the Chapter I prohibition by the OFT.

⁶⁰ A leniency recipient other than the immunity recipient, or 'other leniency recipient', is an undertaking which is granted a reduction (as opposed to 100 per cent leniency) in any financial penalty for breach of Article 81 by the OFT, the European Commission, or an EU NCA or an undertaking which is granted a reduction in any financial penalty for breach of the Chapter I prohibition by the OFT.

⁶¹ A non-leniency recipient is an infringing undertaking which did not apply for or was not granted leniency in respect of any financial penalty for breach of Article 81 by the OFT, the European Commission, or an EU NCA or an infringing undertaking which did not apply for or was not granted leniency in respect of any financial penalty for breach of the Chapter I prohibition by the OFT.

- 7.20 This option would present a number of potential issues - for example, how the liability of the immunity recipient would be circumscribed if the immunity recipient is not to be jointly and severally liable.
- 7.21 The second option would be to allow claimants to bring an action and obtain judgment against an immunity recipient under normal principles of joint and several liability, whilst empowering the court to allow that immunity recipient, in turn, to seek contributions of up to 100 per cent from non-leniency recipients. In order to preserve incentives for undertakings to apply for leniency even if they are not eligible for immunity, contribution should be sought from the other leniency recipients according to the usual rules (that is, having regard to the extent of their responsibility for the damage in question).
- 7.22 This proposal is more advantageous to the claimant than the first option, as it does not remove the benefit to the claimant of the defendants' joint and several liability. An example of how it could operate is set out below.

A, B and C have entered into a cartel. They are each equally responsible (that is, as to one third) for the infringement. The claimant successfully brings an action against A on the basis that A is jointly and severally liable for harm caused by A, B and C.

A benefits from 100 per cent leniency and is, therefore, an immunity recipient. B has been granted Type C leniency and is, therefore, an other leniency recipient. C did not apply or was not granted leniency and is, therefore, a non-leniency recipient.

We assume that, under ordinary principles, A could recover one third of the total liability by way of contribution from B, and a further third from C. Under the proposed model, A can still only obtain one third of total liability from B (as B is an other leniency recipient, the normal rules would apply). However, the court could order that A recovers up to **two thirds** by way of contribution from the non-leniency recipient C - this is over and above what A would be able to seek under the normal principles.

7.23 In terms of practical operation of this model, the existing provisions on contribution⁶² could be amended to include a power for the court to apportion liability along the lines described above, having regard to the fact that the person(s) seeking contribution benefited from immunity from financial penalties granted under a relevant leniency regime, when determining the amount of the contribution recoverable from non-leniency applicants.

Possible redress in the context of the OFT's administrative settlement of cases

7.24 We are also exploring whether, as part of our administrative procedure, it might be appropriate for the OFT to encourage undertakings against whom it proposes to take enforcement action to provide redress to those who have suffered loss due to infringements.

7.25 In the *Independent Schools* case, as part of a wider settlement of that case, the schools agreed to make payments totalling several million pounds into a trust fund to be applied for the benefit of those affected, that is, the pupils who attended the schools during the academic years in which the infringement took place.⁶³

7.26 Each school agreed to pay a penalty which was substantially lower than the penalty which would otherwise have been imposed on it. Under the terms of the settlement, the schools admitted their participation in the

⁶² Section 1(1) of the Civil Liability (Contribution) Act 1978 provides that, '... any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)'. Section 2(1) provides that, '... the amount of the contribution recoverable ... shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question'. Section 2(2) provides that, '... the court shall have power ... to exempt any person from liability to make a contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity'. The position in Scots law, as governed by section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, is similar but not identical.

⁶³ See OFT press release 166/06, dated 23 November 2006.

exchange of the information about intended fee levels and that this amounted to an infringement of UK competition law. The schools also agreed to limit their representations on the OFT's statement of objections, addressing only material factual inaccuracies.

8 CONSISTENCY OF POLICY

- 8.1 *A World Class Competition Regime* expressed the Government's intention that the OFT would act as a champion of competition - ensuring that consumers and businesses understand the importance of competition policy. The OFT plays a central role in the development and implementation of competition policy in the UK.
- 8.2 With a greater number of private actions, and a developing interface between public enforcement and private actions, the need for the OFT to ensure a consistent application of competition policy in the UK is likely to increase. In particular, the question arises as to how courts considering private competition law actions take into account the evolution of competition policy, including the decisions of, and guidelines produced by, the OFT. The OFT's approach to intervention in private actions is a related consideration.
- 8.3 We would welcome comments on any aspect of the issues discussed below.

Status of OFT decisions and guidance

- 8.4 Consistency of policy is a key element of competition law enforcement in the UK and throughout the EU. In particular:
- section 60 of the CA98 ensures that questions arising in the application of the CA98 are dealt with in a manner that is consistent with the treatment of corresponding questions arising under EC competition law. Under section 60(2), any UK court or tribunal must act 'with a view to ensuring that there is no inconsistency' with EC law as applicable at that time. Furthermore, under section 60(3), any UK court or tribunal must 'have regard' to any relevant decision or

statement of the Commission (that is, decisions or statements which have the authority of the Commission as a whole),⁶⁴ and

- where an agreement/conduct may affect trade between Member States, the terms of Regulation 1/2003 also apply. Under Article 3, the OFT is also obliged to apply Articles 81 and 82 where it applies national competition law to agreements or practices which may affect trade between Member States. The application of national competition laws to agreements, decisions or concerted practices within the meaning of Article 81(1) must not lead to the prohibition of such agreements, decisions or concerted practices if they are also not prohibited under Community competition law.

8.5 These provisions (and in the UK context, section 60 of the CA98 in particular) are intended to ensure the consistent application and development of UK and EC competition law. With a greater number of private actions and more cases decided by the courts, the need to ensure the consistent application of competition law is likely to become more acute. Furthermore, there is a risk that the policy-making role of competition authorities could become less effective. As a consequence, the development of competition law could become more haphazard and less consistent, raising uncertainty and costs for business. In our view, appropriate safeguards are necessary to ensure that competition policy continues to develop in a coherent fashion and that business does not face increased uncertainty and costs.

8.6 The rationale for the application of section 60(3) of the CA98 to guidelines and decisions of the Commission also applies to guidelines and decisions of the OFT and, where appropriate, other UK NCAs. We would therefore suggest that a provision should be introduced into the CA98 requiring the courts to 'have regard' to UK NCAs' decisions and guidelines when determining CA98 issues to ensure consistent and clear development of competition policy before UK courts and tribunals. The

⁶⁴ *Modernisation* (OFT442, December 2004), paragraph 4.11.

OFT interprets 'have regard to' to mean 'give serious consideration to' - 'have regard to' does not mean that the court is bound.

OFT as intervener

- 8.7 Any party whose statement of case raises or deals with an issue relating to the application of Article 81 or 82, or Chapter I or II, must serve a copy of the statement of case on the OFT at the same time as it is served on the other parties to the claim.⁶⁵ The purpose of these provisions is to ensure that the OFT is kept informed of private actions and it may be appropriate to extend these provisions to cover notices of appeal. We also note that there are no equivalent provisions concerning private actions in Northern Ireland or Scotland.
- 8.8 Under Regulation 1/2003, UK NCAs have the right to make written submissions to the courts and may apply for permission to make oral observations on issues relating to Articles 81 and 82.⁶⁶ Equivalent provisions were introduced in England and Wales in respect of issues relating to Chapters I and II of the CA98.⁶⁷ If the level of private competition law actions increases, it will become more important for the OFT to consider intervention in certain cases. The OFT will not intervene in support of individual claimants or defendants, however. Our resources are limited and we are likely to give priority to cases where appellate courts are hearing private actions and there is a risk that they may not otherwise be made aware of broader policy issues. The OFT has already used this power to intervene before the House of Lords⁶⁸ but we will keep our approach under review in the light of developing experience.

⁶⁵ *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*, paragraph 3.

⁶⁶ See Article 15(3) of Regulation 1/2003 and *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*, paragraph 4.1.

⁶⁷ *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*, paragraph 4.1A.

⁶⁸ *Inntrepreneur Pub Company (CPC) & Ors v. Crehan* [2006] UKHL 38; [2006] 3 WLR 148.

9 INVITATION TO COMMENT

We look forward to receiving comments on the issues and options covered in this Paper, or on issues relating to private actions in competition more generally - for example, whether there are barriers to effective redress and/or possible solutions that are not addressed in the Paper but would nevertheless merit consideration.

COMMENTS OR COMPLAINTS ABOUT THE CONSULTATION PROCESS

If you wish to comment on the conduct of this consultation or make a complaint about the way this consultation has been conducted, please write to:

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