

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

Recommendations from the Office of Fair Trading

November 2007

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# CONTENTS

| <i>Chapter</i>                                   | <i>Page</i> |
|--|-------------|
| Definitions                                      | 1           |
| 1 Introduction                                   | 2           |
| 2 Background                                     | 5           |
| 3 Benefits for the economy as a whole            | 9           |
| 4 A balanced system of private actions           | 12          |
| 5 Representative actions on behalf of consumers  | 14          |
| 6 Representative actions on behalf of businesses | 18          |
| 7 Models for representative actions              | 20          |
| 8 Costs and funding arrangements                 | 30          |
| 9 The interface with public enforcement          | 37          |
| 10 Consistency of policy                         | 40          |
| 11 Effective claims resolution                   | 42          |
| 12 EU issues                                     | 48          |
| 13 Consumer and business information             | 52          |

## DEFINITIONS

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

- ADR means alternative dispute resolution
- CA98 means the Competition Act 1998
- CAT means the Competition Appeal Tribunal
- CFA means conditional fee agreement and references in this Paper to a CFA include speculative fees in Scotland
- CPR means the Civil Procedure Rules
- EA02 means the Enterprise Act 2002
- GLO means Group Litigation Order
- NCA means a competition authority of a Member State of the European Union belonging to the network of public authorities applying the EC competition rules as designated under Article 35(1) of Regulation 1/2003
- OFT means the Office of Fair Trading, and
- 'Representative bodies' means bodies designated by the Secretary of State or bodies given permission by the court to bring an action on behalf of consumers or businesses.

# 1 INTRODUCTION

- 1.1 The purpose of this Paper is to make recommendations to the Government as to the steps which, in the OFT's view, should be taken at the domestic level to improve the effectiveness of redress for those who have been harmed by breaches of competition law. Although the legal systems of England and Wales, Scotland and Northern Ireland are different in various respects, such that methods of implementation would vary by jurisdiction, the purpose and spirit of the recommendations are of general application.
- 1.2 The Paper recommends that Government consult on the following measures to make private actions in competition law as effective as *A World Class Competition Regime*<sup>1</sup> (the 'White Paper') intended them to be. The measures should be designed and implemented in such a way as to comply with the principles outlined in the OFT's discussion paper, *Private actions in competition law: effective redress for consumers and business*<sup>2</sup> (the 'Discussion Paper'), as supplemented in Chapter 4 below:
- Modifying existing procedures, or introducing new procedures, so as to allow representative bodies to bring standalone and follow-on representative actions for damages and applications for injunctions<sup>3</sup> on behalf of consumers (named consumers or consumers at large)
  - Modifying existing procedures, or introducing new procedures, so as to allow representative bodies to bring standalone and follow-on representative actions for damages and applications for injunctions on behalf of businesses (named businesses or businesses at large)

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<sup>1</sup> Cm 5233, July 2001.

<sup>2</sup> See [http://www.offt.gov.uk/shared\\_offt/reports/comp\\_policy/oft916.pdf](http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916.pdf).

<sup>3</sup> Applications for interdict in Scotland.

- Introducing CFAs in representative actions which allow for an increase of greater than 100 per cent on lawyers' fees
- Codifying courts' discretion to cap parties' costs liabilities and to provide for the courts' discretion to give the claimant<sup>4</sup> cost-protection in appropriate cases
- Establishing a merits-based litigation fund
- Requiring UK courts and tribunals to 'have regard' to UK NCAs' decisions and guidance
- Conferring a power on the Secretary of State to exclude leniency documents, appropriately defined,<sup>5</sup> from use in litigation without the consent of the leniency applicant, and
- Conferring a power on the Secretary of State to remove joint and several liability for immunity recipients<sup>6</sup> in private actions in competition law so that they are only liable for the harm they caused (or not liable at all in exceptional circumstances).

1.3 The Discussion Paper recognised that some new or additional case management powers might be required for the purposes of dealing with certain aspects of representative actions in competition law, in order to minimise the risk of ill-founded litigation. We expect that any Government consultation would consider the safeguards which are required in a fair, efficient, and cost-effective system.

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<sup>4</sup> Pursuer in Scotland

<sup>5</sup> For these purposes, leniency documents are documents created for inclusion in or to support an undertaking's leniency application. See Chapter 9.

<sup>6</sup> Leniency applicants may qualify for immunity (that is, 100 per cent leniency) or for some lesser form of leniency. See Chapter 9.

- 1.4 Models for representative actions are considered more fully in Chapter 7. Possible safeguards include a permission stage in which the representative body applies to the court for permission to bring an action on behalf of consumers or businesses. Relevant factors would vary, depending on whether the representative body has already been designated. Judicial supervision of funding arrangements and any settlement, for example, could also be considered.

## 2 BACKGROUND

- 2.1 Chapter 8 of *A World Class Competition Regime* opened with the statement that 'Private actions are a very important limb of an effective competition regime. Where behaviour is illegal under competition laws, parties who are harmed should be able to bring action against the perpetrators – getting the compensation they deserve'. The White Paper noted that '... the possibility of private actions is a basic tenet of Community law in Europe, and Articles 81 and 82 have had direct effect in the UK since we joined the European Community in 1973'. The CA98 also gives rise to individual rights.
- 2.2 As a result of the White Paper, the EA02 was introduced. The EA02 contains a number of provisions aimed at facilitating private actions.<sup>7</sup> However, private actions have not played the role that was envisaged for them in the White Paper: there remain significant barriers to those who have suffered loss (consumers and small and medium-sized businesses, in particular) taking a private action, such that the likelihood of obtaining compensation remains remote and that incentives for business to comply with competition law are more limited than was intended. This impedes the overall effectiveness of the competition regime in the UK, such that the regime is not yet delivering the productivity and competitiveness benefits to the UK economy that were originally contemplated.
- 2.3 Recent research from the OFT confirms that companies and their advisers view private actions as the least effective aspect of the competition regime in achieving compliance.<sup>8</sup> When asked for suggestions as to what could be done to improve compliance with

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<sup>7</sup> For instance, the EA02 introduced sections 47A and 47B of the CA98.

<sup>8</sup> See *The deterrent effect of competition enforcement by the OFT* (OFT962 and OFT963, November 2007), available at [http://www.of.gov.uk/advice\\_and\\_resources/resource\\_base/consultations/deterrent](http://www.of.gov.uk/advice_and_resources/resource_base/consultations/deterrent).

competition law in the UK, the most frequent responses included encouraging private damages actions.

- 2.4 Although 45 of the 202 companies surveyed by the OFT (22 per cent) thought that their company had been harmed by a breach of competition law by someone else, only five companies finally decided to bring an action. The most commonly cited reason for not bringing an action was that the expected costs outweighed the benefits. Similarly, consumers have never recovered damages for breach of the competition rules in the UK, although consumers have been directly harmed by a number of cartels operating at the retail level.<sup>9</sup>
- 2.5 In 2005, the European Commission published a Green Paper and an accompanying Commission Staff Working Paper, *Damages actions for breach of the EC antitrust rules*.<sup>10</sup> The Commission Staff Working Paper noted that 'Articles 81 and 82 EC create directly effective obligations on, and rights for, individuals. The principle of direct effect means that individuals can assert these rights and enforce these obligations directly before a court in a Member State ... In order to ensure the effectiveness (*effet utile*) of directly applicable Community law rights, national courts must provide adequate remedies for their protection.' The UK Government responded to the Green Paper expressing its support for 'the wider aim of the paper, namely to encourage and facilitate private damages actions to those (consumers and businesses) who have suffered loss due to infringement of competition rules'.<sup>11</sup>

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<sup>9</sup> So far only one representative action for a breach of competition law has been brought. See *The Consumers Association v JJB Sports plc*, Case No. 1078/7/9/07.

<sup>10</sup> See <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/index.html>.

<sup>11</sup> See <http://www.berr.gov.uk/files/file28534.pdf>.

- 2.6 In HM Treasury's 2006 *Pre-Budget Report*,<sup>12</sup> the Government signalled its intention to work with the competition authorities to identify and eliminate any barriers to real redress for parties injured by anti-competitive behaviour. In the 2007 *Budget* itself, the Government indicated that the OFT intended to consult on a discussion paper and welcomed the progress that the OFT had made.<sup>13</sup>
- 2.7 In April 2007 the OFT published the Discussion Paper. The Discussion Paper identified significant barriers to consumers and small and medium-sized businesses (in particular) taking a private action, such that the probability of obtaining compensation remains slight and that incentives to comply with competition law are more limited than the White Paper envisaged. The Discussion Paper also outlined the principles on which any proposals to make private competition law actions more effective should be based and put forward a number of issues and options for discussion.
- 2.8 The Discussion Paper acknowledged that most of the main structural and legal elements for effective private actions in competition law are already in place in the UK. However, the overwhelming majority of respondents to the Discussion Paper welcomed the OFT's initiative in preparing the Discussion Paper and confirmed the above analysis. A minority of respondents suggested that no reforms at all were needed, or appropriate, in standalone actions, given that this would be in conflict with the policy objective of minimising litigation and would upset the checks and balances of the UK's sophisticated civil justice system. Instead, the focus should be on follow-on redress where the role of the

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<sup>12</sup> *Pre-Budget Report, Investing in Britain's potential: Building our long-term future*, Cm 6984, December 2006, paragraphs 3.11 *et seq*, available at [www.hm-treasury.gov.uk/pre\\_budget\\_report/prebud\\_pbr06/prebud\\_pbr06\\_index.cfm](http://www.hm-treasury.gov.uk/pre_budget_report/prebud_pbr06/prebud_pbr06_index.cfm).

<sup>13</sup> *Budget 2007, Building Britain's long-term future: Prosperity and fairness for families*, HC 342, March 2007, paragraphs 3.40 *et seq*, available at [www.hm-treasury.gov.uk/budget/budget\\_07/report/bud\\_budget07\\_repindex.cfm](http://www.hm-treasury.gov.uk/budget/budget_07/report/bud_budget07_repindex.cfm).

OFT could be to ensure that those who have suffered loss are compensated.

2.9 The Discussion Paper was followed by a public hearing in September 2007.<sup>14</sup> At the hearing there was significant support for the objectives of the Discussion Paper and the specific options. Since then HM Treasury has stated in its 2007 *Pre-Budget Report* that the Government intends to consult on, among other things, measures to reduce the barriers preventing those suffering loss as a result of anti-competitive behaviour from obtaining redress, through the courts where necessary, without encouraging ill-founded claims.<sup>15</sup>

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<sup>14</sup> Held at the Congress Centre, London on 24 September 2007.

<sup>15</sup> *Meeting the aspirations of the British People, 2007 Pre-budget report and Comprehensive Spending Review*, paragraph 4.60, available at [http://www.hm-treasury.gov.uk/media/7/4/pbr\\_csr07\\_completereport\\_1546.pdf](http://www.hm-treasury.gov.uk/media/7/4/pbr_csr07_completereport_1546.pdf)

### 3 BENEFITS FOR THE ECONOMY AS A WHOLE

3.1 As the White Paper stated (at paragraph 1.1), '[t]he importance of competition in an increasingly innovative and globalised economy is clear. Vigorous competition between firms is the lifeblood of strong and effective markets. Competition helps consumers get a good deal. It encourages firms to innovate by reducing slack, putting downward pressure on costs and providing incentives for the efficient organisation of production. As such, competition is a central driver for productivity growth in the economy, and hence the UK's international competitiveness.'

3.2 Three recent examples illustrate the impact that anti-competitive behaviour can have on consumers in the UK.

- In *Hasbro/Argos/Littlewoods*,<sup>16</sup> 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*,<sup>17</sup> 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,<sup>18</sup> 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.

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<sup>16</sup> See OFT press release 149/06, dated 19 October 2006.

<sup>17</sup> *Ibid.*

<sup>18</sup> See OFT press release 49/07, dated 22 March 2007.

- 3.3 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.
- 3.4 An effective private actions system increases 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 potential liabilities increase, so does 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).
- 3.5 Increased incentives to comply with, and interest in, competition law can be expected to encourage the development of a competition culture, in which responsible business leaders and boards recognise the benefits of competition in properly functioning, open markets to the business community, to consumers and to the productivity and competitiveness of the UK economy. Responsible businesses would expect their executives to comply with the law and provide appropriate training and monitoring to ensure that they do so. Boards, applying good corporate governance principles, would treat compliance with competition law as an important aspect of risk management and of the internal audit and compliance function. Boards would take prompt and effective action where executives or systems fail.
- 3.6 In this way public enforcement and private actions are complementary and mutually reinforcing in securing productivity and competitiveness benefits for the UK economy. Conversely, they are not alternatives – more private actions do not mean less public enforcement. Public enforcement is a fundamental pillar of the system, but public enforcement has to be focused and make the optimum use of the resources that are made available from the public purse. In the absence of effective private actions, significant harm to consumers and

businesses will continue to go unchecked and the desired positive impact on productivity, growth and innovation will not be achieved.

## 4 A BALANCED SYSTEM OF PRIVATE ACTIONS

4.1 We recommend that any proposals designed and implemented to make private competition law actions as effective as they were intended to be in the White Paper should be in line with the following principles:

- any changes must be aimed at providing greater access to redress for those harmed by anti-competitive behaviour, whilst at the same time safeguarding against the development of a 'litigation culture'<sup>19</sup> by ensuring that there are procedures, criteria and filters in place to facilitate the fair, efficient and cost-effective resolution of disputes
- consumers and businesses 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
- bodies which are representative of consumers and businesses should be allowed to bring private actions on behalf of those persons
- injunctive relief should be available along with the ability to bring an action for damages since the former may be as, if not more, important than the latter in certain circumstances<sup>20</sup>
- private competition law actions should exist alongside, and in harmony with, public enforcement, and
- 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.

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<sup>19</sup> See paragraphs 7.20 *et seq* below.

<sup>20</sup>This principle did not feature in the Discussion Paper but was raised in certain responses to the consultation.

- 4.2 The courts in England and Wales, in particular, already have strong case management powers<sup>21</sup> and make greater use of them than courts in other jurisdictions. English courts have the power to strike out statements of case disclosing no reasonable grounds for bringing (or defending) the claim and to apply a costs sanction. They 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.
- 4.3 The Discussion Paper recognised that some new or additional case management powers might be required for the purposes of dealing with certain aspects of representative actions in competition law, in order to minimise the risk of ill-founded litigation. We expect that any Government consultation would consider the safeguards which are required in a fair, efficient, and cost-effective system.
- 4.4 Models for representative actions are considered more fully in Chapter 7. Possible safeguards include a permission stage in which the representative body applies to the court for permission to bring an action on behalf of consumers or businesses. Relevant factors would vary, depending on whether the representative body has already been designated. Judicial supervision of funding arrangements and any settlement, for example, could also be considered.

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<sup>21</sup> In Scotland, under the commercial procedure case management powers exist, allowing the judge to take a more interventionist role and streamlining the process. Under the ordinary procedure, safeguards are less formal.

## 5 REPRESENTATIVE ACTIONS ON BEHALF OF CONSUMERS

### Introduction

- 5.1 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 persons who have been harmed are not themselves party to the action and are not required to pay the other side's costs if the case is lost (although the representative body may be required to do so). Currently, representative actions on behalf of named consumers are only allowed in follow-on cases under section 47B of the CA98.
- 5.2 The Discussion Paper suggested allowing representative bodies (that is, designated bodies or bodies granted permission by the courts) to bring standalone representative actions on behalf of consumers.
- 5.3 The majority of respondents were in support of this option. It was felt that standalone actions would allow consumers with small individual claims collectively to seek redress and that such action would complement public enforcement.
- 5.4 Respondents who did not favour this option felt that as follow-on actions in the CAT had only been allowed since 2003, it was premature to introduce further reforms. Furthermore, the current availability of GLOs in England and Wales was cited as being able to assist collective actions. Finally, it was argued that the focus should be on follow-on redress only, where the role of the OFT could be to ensure that those who have suffered loss are compensated.
- 5.5 Other respondents, while not providing a clearly favourable or unfavourable response to this option, contended that standalone actions are likely to be less meritorious than follow-on actions and run the risk of chilling competition. As such, it naturally ought to be more difficult to bring standalone actions than follow-on actions.

- 5.6 A number of respondents pointed out that the ability to obtain injunctive relief may be as, if not more, important than the ability to bring an action for damages in certain circumstances.

### **OFT views and recommendations**

- 5.7 The OFT notes that currently section 47B of the CA98 only allows a representative action to be brought in the CAT where the OFT, a concurrent regulator or the European Commission has made an infringement decision. As competition authorities have finite resources, this limits the number of cases in which consumers can seek redress:<sup>22</sup> it is not realistic to expect that a competition authority could investigate all cases where consumers have been harmed and then take on the role of securing redress for them. If competition authorities were to pursue every single alleged infringement, this would weaken rather than strengthen the competition regime. Resources would have to be thinly spread over a great number of cases. Investigations would take significantly longer and the amount of time needed to bring the most serious infringements to an end would increase. These difficulties would be exacerbated if competition authorities were required to secure redress for consumers.<sup>23</sup>
- 5.8 A robust and effective regime requires public enforcement to be focused on those cases that are considered to be the most important because they pose the greatest threat to consumer welfare or vulnerable groups. It is for this reason that the OFT has sought to optimise the impact of its public enforcement work by increasingly focusing on high-impact outcomes rather than the number of investigations. Since there are, therefore, inevitably cases which the competition authorities do not pursue, consumers who do not have the resources or skills to pursue

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<sup>22</sup> Competition authorities are thought to detect around only 15 per cent of cartels. See PG Bryant and EW Eckard, *Price Fixing: the Probability of Getting Caught*, Review of Economics and Statistics (1991) 73, pages 531 to 536.

<sup>23</sup> See, however, Chapter 11 on effective claims resolution.

redress on their own are disadvantaged vis-à-vis infringing undertakings. Accordingly, even against the background of high-impact public enforcement, the regime is not currently optimised to deliver the intended benefits to the UK economy in terms of productivity and competitiveness.

- 5.9 There are clear benefits in allowing standalone representative actions on behalf of consumers. In particular, the introduction of standalone representative actions on behalf of consumers would allow a greater number of meritorious cases to be brought without prior action by a competition authority. Such actions could be made possible by extending the mechanism in section 47B of the CA98 or, possibly, by modifying the GLO, which is a generic multi-party procedural device in England and Wales.<sup>24</sup>
- 5.10 Representative actions have significant advantages over both individual claims and GLOs (or other, less formal ways of grouping actions together) because they reduce the cost and time that consumers have to invest into a claim:
- GLOs, in particular, still require consumers individually to issue claims (before common issues can be assessed),
  - GLOs often involve the costs of a test case being shared among the individual litigants. Accordingly, individual consumers would be required to pay the other side's costs if the case is lost. Individual litigants are also exposed to the risk of adverse costs when individual issues are adjudicated, and

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<sup>24</sup> In Scotland, there is no formal procedure to deal with multi-party actions or for grouping similar cases together. However, cases dealing with similar issues may be grouped together informally. For example, the court could seek to identify common issues of law and/or fact and designate a 'lead' action to determine such common issues. This still requires individual consumers to commence individual legal proceedings, however, and the 'lead' claimant (pursuer) would likely bear all the cost and risks of the lead litigation.

- A consumer is therefore likely to be very reluctant to issue the first claim.

5.11 In representative actions, by contrast, claims are bundled together and one claimant, the representative body, brings the action on behalf of the consumers. In this way, representative actions optimise economies of scale, benefiting consumers whose individual loss is small compared to the resources required to pursue a case.<sup>25</sup> This is particularly significant if the aggregate loss to consumers is very large.

5.12 The OFT notes that in Scotland a wide ranging review of the Civil Courts is being undertaken by the Lord Justice Clerk the Lord Gill. This review may consider procedures for dealing with multi-party actions in general. There may therefore be scope to import relevant features of representative actions into any such procedures.

5.13 The OFT recommends that the Government should consult on whether (and, if so, how best) to allow representative bodies to bring standalone and follow-on representative actions for damages or injunctions on behalf of consumers in competition law.

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<sup>25</sup> Court fees for representative actions, if set at too high a level, could negatively impact on economies of scale.

## 6 REPRESENTATIVE ACTIONS ON BEHALF OF BUSINESSES

### Introduction

- 6.1 Currently, there is no provision allowing representative actions to be brought on behalf of businesses.
- 6.2 The Discussion Paper suggested giving representative bodies the power to bring standalone and follow-on representative actions on behalf of businesses.
- 6.3 The majority of those who commented on this option supported it. Those in support felt that in order to encourage a compliance culture, it was important to have the ability to bring private actions for breaches of competition law and that standalone actions would complement public enforcement. The majority of supporters felt that this option should be restricted to small and medium-sized businesses. Several respondents accepted that small and medium-sized businesses face similar difficulties to consumers in bringing a claim and felt that the CAT's jurisdiction should be extended to allow it to hear standalone actions brought on behalf of businesses.
- 6.4 Other respondents commenting on this option felt that, in the absence of evidence that GLOs did not address the concerns raised by the OFT, GLOs were more appropriate and that their use should be encouraged. Some respondents felt that businesses were likely to have individual commercial and legal interests, such that they would need to take advice on an individual rather than a collective basis. Other concerns included the risk that businesses would use standalone actions as a tactical litigation tool to disrupt legitimate business activity. Finally, it was argued that the focus should be on follow-on redress only, where the role of the OFT could be to ensure that those who have suffered loss are compensated.
- 6.5 A number of respondents pointed out that the ability to obtain injunctive relief may be as, if not more, important than the ability to bring an action for damages in certain circumstances.

*OFT views and recommendations*

- 6.6 Overall, the evidence indicates that businesses face barriers to effective private redress. In certain circumstances, the barriers may be almost as significant as those faced by consumers. This is a serious shortcoming of the current system. Small and medium-sized businesses should be on an equal footing with both consumers and big business insofar as a realistic prospect of obtaining redress for harm caused by anti-competitive behaviour is concerned. Actions by business are a step towards balancing the economic harm caused by the offending parties.
- 6.7 Representative actions on behalf of businesses should be allowed in standalone and follow-on cases alike: as explained at paragraph 5.7 above, it is not realistic to expect that a competition authority could investigate all cases where businesses have been harmed and then take on the role of securing redress for them. The considerations outlined at paragraphs 5.8 *et seq* above also apply to businesses.
- 6.8 The OFT recommends that the Government should consult on whether (and, if so, how best) to allow representative bodies to bring standalone and follow-on representative actions for damages or injunctions on behalf of businesses in competition law.

## 7 MODELS FOR REPRESENTATIVE ACTIONS

### Introduction

- 7.1 The Discussion Paper dealt with two models for bringing representative actions. The first involved representative actions being brought on behalf of named consumers and businesses who have given their express consent to be bound by the outcome of the litigation. The second model would allow representative actions to be brought on behalf of consumers and businesses at large whereby if a consumer or business does not wish to be bound by the outcome of the litigation, he must assert this wish within a specified period.

### Representative actions on behalf of named consumers and businesses

- 7.2 The majority of respondents who commented on the first model (whereby representative actions should be brought on behalf of named consumers or businesses) were in support of it and felt that as a matter of principle it should be for the individual consumer or business to decide whether to become involved in litigation and decide who should represent him. As the objective of representative actions was to compensate an identifiable group of persons, a defined group whose losses could be quantified was required. Other respondents argued that a model which required named persons to participate in an action would act as a safeguard against speculative claims, as potential claimants would have to be persuaded of the claim's merits for it to be launched. Other respondents were supportive so long as claimants were allowed to join an action during its progress.
- 7.3 Other respondents argued that this model had not been tested in litigation and consumers would lack a clear incentive to join an action until after a case had been resolved in their favour. Arguments were also made that a significant proportion of meritorious claims would not be brought under this model as individual consumers or businesses would consider their loss to be too small to join an action to recover their loss.

## Representative actions on behalf of consumers and businesses at large

- 7.4 Support for this model appears to be increasing, from small and medium-sized businesses, consumer groups and some law firms and barristers.
- 7.5 Those in favour felt that it would create a more robust system of private actions, allowing for the full economic costs of an infringement to be addressed. It was also argued that this model would be more suitable for low-value claims where consumers face barriers to participating in legal actions. Furthermore, some respondents felt that allowing an action to be brought on behalf of consumers or businesses at large would in itself promote compliance with competition law. It was also pointed out that the 'excesses' of the US system, which were to be avoided, were not exclusively the result of its 'opt-out' system.<sup>26</sup> Opt out regimes have been endorsed extensively in a number of common law jurisdictions (including Canada and Australia). Some supportive respondents suggested modifications to allow judges to order defendants<sup>27</sup> to produce records identifying their customers so that payments could be made to them or that the model could be made subject to a 'sunset clause'. In this scenario, the ability to bring actions on behalf of consumers and businesses at large would lapse unless renewed at the end of a specified period.
- 7.6 Respondents who did not favour this model argued that it would lead to speculative litigation and the rise of a litigation culture. They suggested that the economies of scale achieved by a representative body could alter the balance of power in settlement discussions, causing defendants to settle unmeritorious claims. There were fears that a model allowing claims to be brought on behalf of consumers or businesses at large would operate to shift the role of private actions from compensating those who had suffered loss towards punishing the infringer.

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<sup>26</sup> See paragraphs 7.22 *et seq* for a discussion of the differences between the civil justice systems in the US and the UK.

<sup>27</sup> Defenders in Scotland.

## **Increased case management powers for courts**

- 7.7 Most respondents who commented on this issue agreed that given the costs and diversion of management time that can arise as a result of ill-founded actions, strengthening the courts' case management powers should be encouraged. Others noted that case management powers were already in place and suggested that the OFT should issue a policy statement as to how and when those powers should be used.

## **Fund management and 'cy pres'**

- 7.8 The Discussion Paper stated that, if representative actions are to be brought on behalf of consumers and businesses at large, one possible system for the management and distribution of damages recovered would be to allow the court to direct how they should be used for the benefit of consumers.
- 7.9 Few respondents made substantive comments on this option. Those who did not support it primarily suggested that compensation should be paid to those who have suffered loss and not amount to a windfall arising from consumers' lack of interest in the proceedings. Others claimed that the option led to practical problems such as who would administer the fund and at whose cost.
- 7.10 Those in support suggested that in certain circumstances it would be impractical for damages to be distributed to those who have suffered loss. It was suggested that the claim could be for the benefit of the representative body itself and that such a body was unlikely to bring ill-founded claims. It was also submitted that undistributed funds should be managed by the courts for good purposes and that public bodies could make proposals as to how such funds should be applied. Other jurisdictions with collective actions allowed for cy pres distribution and therefore recognised that such distribution was appropriate in certain cases.

## OFT views

- 7.11 The OFT notes that Chapter 8 of the White Paper envisaged the possibility of private actions on behalf of consumers at large, with the Government explicitly stating that '[t]he Government is concerned that consumer groups will have little incentive to bring cases if they are required to identify large numbers of harmed parties'. However, section 47B of the CA98, when enacted, was limited to claims on behalf of named consumers.
- 7.12 The current evidence suggests that representative actions exclusively on behalf of named consumers continue to fail to optimise economies of scale and give rise to unnecessary costs and complexity. There is a risk that meritorious cases may not be brought or may only be brought by, or on behalf of, a small number of those who have been harmed.<sup>28</sup> Representative actions on behalf of consumers or businesses at large have an important role to play in securing access to justice and ensuring the effectiveness of the competition regime.
- 7.13 There are a number of benefits in allowing a representative action to be brought on behalf of consumers or businesses at large.<sup>29</sup>
- 7.14 First, such an action automatically avoids the risk of inconsistent decisions and increases legal certainty (including for the defendants). The OFT notes that GLOs can already be used to bind later claimants but this requires a direction from the judge.
- 7.15 Second, the cost of an action brought on behalf of the entire group of those who have been harmed is likely to be lower than the sum of the costs of individual actions and possibly also of the sum of the cost of individual settlements. As explained above at paragraphs 5.11 and 6.7,

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<sup>28</sup> See, for example, the notice of a claim for damages in *The Consumers Association v JJB Sports plc*.

<sup>29</sup> See also Chapter 4 of the Discussion Paper.

economies of scale are achieved by aggregating the claims. Depending on the nature and magnitude of individual claims, it is possible that only a few members of the group state their intention not to be bound by the outcome of the action. Therefore, an action brought on behalf of consumers or businesses at large optimises economies of scale.

- 7.16 Third, aggregating claims in an action on behalf of consumers or businesses at large alleviates the incentive problem that affects many consumers and businesses which are concerned about the imbalance between claimants and defendants and are reluctant to take action to enforce their rights.
- 7.17 Fourth, on the assumption that very few members of the group state their intention not to be bound by the outcome of the litigation, a representative action brought on behalf of consumers or businesses at large ensures that defendants compensate the whole loss caused or pay damages based on the benefits gained from the breach (unjust enrichment).
- 7.18 Fifth, if a greater number of well-founded actions are brought, the incentives to comply with competition law will be increased, as envisaged in the White Paper. This would strengthen the role of private actions as a complement to public enforcement, delivering productivity and competitiveness of the UK economy.
- 7.19 The OFT is aware that representative actions on behalf of consumers or businesses at large may give rise to costs for the administration and distribution of the award, including where the fund is not wholly distributed to the members of the group.<sup>30</sup>

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<sup>30</sup> There may also be issues relating to Article 6 of the European Convention of Human Rights if the proceedings or judgment bind persons who are unaware of their right to state that they do not wish to be bound by the outcome of the litigation. There are a number of ways to address this concern, depending on the facts of the case. Customers may be identified prior to the action and notified individually. Alternatively, effective publicity of the action should be required. Furthermore, we note that even under the existing GLO regime, the court has the power to direct that a judgment should be binding on later claimants.

- 7.20 The OFT notes that the debate on the different models for identifying claimants often relies on two assumptions. The first is that a so-called opt-out regime would almost inevitably lead to a 'US style litigation culture'. The second is that so-called opt-in regimes and so-called opt-out regimes cannot co-exist. Neither assumption is necessarily correct, as explained further below.
- 7.21 The OFT is acutely conscious of the potential social costs of ill-founded litigation. In the OFT's view, any system of representative actions should have as its objective the fair, efficient and cost-effective resolution of disputes. Procedures, criteria and filters should be designed to achieve this objective, to the extent that they are not already in place.

### **Avoiding the risk of a 'US style litigation culture'**

- 7.22 The OFT considers that adoption of a balanced and proportionate private actions regime which allows representative actions to be brought on behalf of consumers and businesses at large under appropriately defined conditions and safeguards will not lead to a 'US style litigation culture'. The OFT notes that, even if the possibility of representative actions on behalf of consumers and businesses at large were introduced in the UK, the features of the US civil justice system which are often associated with a 'litigation culture' are not present. Accordingly, it is unlikely that any of the perceived shortcomings of the latter may materialize in the former.
- 7.23 First, in the US, a class action may be brought by one member of the class on behalf of the entire class. A member of the class may be an individual with little interest in the litigation and with no cost exposure to the defendant if the claim fails. A representative action is an action brought by a designated body or a body given permission by the court. In both cases, criteria would apply, ensuring that only responsible bodies genuinely acting in the interest of consumers or businesses are given standing.

- 7.24 Second, in the US, treble damages are available. In the UK, no multiple damages are available although the court has the power, in certain circumstances, to award punitive damages.
- 7.25 Third, in the US the claimant is not liable for the defendant's costs if he loses the case. In the UK, the general principle is that costs follow the event.<sup>31</sup> This general principle should continue to apply, but there may be merit in clarifying the powers of the court to cap costs or grant the claimant cost-protection on a case-by-case basis.
- 7.26 Fourth, in the US, the claimant has a right to a jury trial. The jury decides on both liability and quantum. In the UK, civil competition cases are tried by judge alone.
- 7.27 The OFT also notes that, in England and Wales, the courts have wide case management powers and make greater use of them than courts in other jurisdictions. They can strike out a statement of case or impose costs sanctions on the parties or even on their lawyers.<sup>32</sup>

#### **Co-existence of so-called opt-in and opt-out regimes**

- 7.28 So-called opt-in and so-called opt-out regimes can co-exist. It could be left to the judge to decide, in the circumstances of each case but on the basis of appropriately defined criteria and filters, whether given claims should be brought as a representative action on behalf of consumers/businesses at large, as a representative action on behalf of named consumers/businesses, or as individual actions. Strong judicial supervision would ensure that any representative actions on behalf of consumers/businesses at large are fair, efficient and cost-effective and that parallel actions in the same case are managed effectively.

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<sup>31</sup> Expenses follow success in Scotland.

<sup>32</sup> Similar safeguards exist in Scotland.

7.29 In the OFT's view, the availability of representative actions on behalf of consumers or businesses at large would encourage a greater number of well-founded actions to be brought. Given the barriers to effective redress identified in the consultation, the absence of a representative action which may be brought on behalf of consumers or businesses at large is a significant shortcoming of the present system. This weakness was correctly identified in the White Paper and must now be addressed.

#### **Issues to be considered**

7.30 We expect that any Government consultation would consider the procedures, criteria, and filters which are required to ensure that, where a representative action on behalf of consumers/businesses at large (in particular) is contemplated, the aims of fairness (both to the harmed consumers and businesses and to the defendants), efficiency, and cost-effectiveness are achieved. The following issues could be considered:

- **Pre-action procedure.** A pre-action procedure could be introduced to allow for early exchange of information (including customer information) between the parties and settlement if appropriate<sup>33</sup>
- **Permission stage.** A permission stage could be introduced in which the representative body applies to the court for permission to bring an action on behalf of consumers or businesses. Relevant factors could include suitability of the body to represent consumers or businesses (for non-designated bodies only), the ability to show a *prima facie* case and to manage the proceedings, identifiability of a group of consumers or businesses, jurisdiction, commonality of issues, fairness (to the claimants as well as to the defendants), efficiency, and cost-effectiveness of the procedure. The public and private resources likely to be required, as well as the potential costs and burdens on the court system and on private parties,<sup>34</sup> would fall to be considered.

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<sup>33</sup> See also paragraphs 11.7 *et seq* below.

<sup>34</sup> This would be consistent with the overriding objective in Rule 1.1 of the CPR.

- **Case management.** The court should exercise its case management powers throughout the proceedings in a robust way. The court's discretion as to costs based on the general principle that costs follow the event should be upheld, while recognising that, particularly in representative actions, the courts should have the power, but not the duty, to depart from this general principle either *ex ante* or *ex post* where it would be fair, just and reasonable to do so, having regard to all the facts and circumstances of the case. Consideration should be given to how to address the possibility of parallel representative actions being brought by different representative bodies and how to consolidate, at an early stage of the procedure, all claims by direct and indirect purchasers, and
- **Judicial supervision of any settlement and funding arrangements.** Court approval of any settlement could be required. This may be desirable in consideration of the fact that the action is brought on behalf of unnamed consumers or businesses. The court's function would be to assess whether the settlement is appropriate and in the interest of the relevant (and as yet unnamed) parties. Consideration could also be given to supervision of certain funding arrangements that representative claimants may use, particularly when such arrangements may have an impact on the liabilities of the defendants or on the rights of the consumers or businesses represented by the claimant.

7.31 Fair, efficient, and cost-effective systems could (and, in our view, should) be devised in order to calculate damages in the aggregate without the necessity to prove the individual loss suffered by each individual consumer or business. The court could be given the power, if calculation of compensatory damages is evidentially too complex or inefficient, to direct that damages should be awarded on a restitutionary basis, (that is, based on the benefits gained by the wrongdoer from the breach rather than on the loss suffered by consumers or businesses).

7.32 In addition, the following issues specific to businesses could be considered:

- whether representative actions should be allowed only on behalf of small and medium-sized businesses
- if so, how qualifying small and medium-sized businesses should be identified for these purposes – traditional 'bright-line' tests based on turnover or number of employees may not be sufficiently flexible. A better option would be to leave it to the court to consider whether it is fair, efficient, and cost-effective for the businesses in question to pursue the action as a representative action rather than as a set of individual actions, and
- how to address potential conflicts of interest between businesses represented by the same body.

#### **OFT recommendations**

7.33 The OFT recommends that it should be open to the judge to decide, in the circumstances of each case but on the basis of appropriately defined criteria and filters, whether given claims should be brought as a representative action on behalf of consumers/businesses at large, as a representative action on behalf of named consumers/businesses, or as individual actions.

7.34 The OFT recommends that the Government consult on the procedures, criteria, and filters which are required to ensure that, where a representative action on behalf of consumers/businesses at large (in particular) is contemplated, the aims of fairness (both to the harmed consumers and businesses and to the defendants), efficiency, and cost effectiveness are achieved.

7.35 The OFT recommends that damages should also be available on a restitutionary basis and that mechanisms be developed for the management and distribution of damages awards.

## 8 COSTS AND FUNDING ARRANGEMENTS

### Conditional fee agreements

- 8.1 The Discussion Paper suggested that the currently permitted percentage increase on lawyers' fees may not sufficiently incentivise lawyers to take well-founded, standalone actions. The OFT suggested allowing the percentage increase of up to 100 per cent to be recoverable from the losing party with any additional increase being 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.
- 8.2 The respondents who were in favour of this option suggested that the complexity of competition cases involved additional risks for lawyers<sup>35</sup> and that this option would encourage lawyers to take on a greater number of meritorious cases. It was suggested that the currently permitted percentage increase was 'wholly inadequate to provide an incentive when weighed against the high level of risk inherent to competition law actions'. Others suggested that an additional percentage increase would help to establish a claimant bar and remove the current 'commercial inequity' whereby funders are able to make a much greater return than lawyers are. One respondent in writing and another at the hearing suggested that in a 'pioneer' case (that is, a case which 'pioneers' a particular legal issue that needs clarification), the percentage increase permissible could be higher than might otherwise be the case.
- 8.3 Many of the respondents argued that there was no reason why competition cases should benefit from fee arrangements which are different from those in other cases and that inconsistency was not in the public interest. Others said that the option would lead to claimants' lawyers having a financial interest in damages recovered and would risk

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<sup>35</sup> For instance, a former Advocate General at the European Court of Justice in Luxembourg has suggested that the combination of legal, economic, accountancy and public policy issues in competition law makes it 'totally unique'.

conflicts of interest between client and lawyer. Some respondents suggested that the current 100 per cent cap is based on the concept that cases with a prospect of success below 50 per cent should not normally be pursued and changing this would promote unmeritorious litigation. Finally, one respondent suggested that a client would go to the maximum percentage increase permitted as this would make his lawyer 'maximally aggressive'.

- 8.4 The OFT considers it unlikely that lawyers will work on cases which they expect to lose. Accordingly, any risks of an additional percentage promoting unmeritorious litigation are likely to be overstated. Furthermore, safeguards are already in place, or can be put in place, to minimise this risk, such as case management powers (for example, striking out) and costs sanctions.
- 8.5 The OFT believes that the public interest dimension in representative actions is generally greater than in individual cases. Representative actions provide access to justice for a range of persons who have been harmed in the same way, when they would otherwise have none. However, representative actions are novel and require, especially at pre-action stage, activity over and above what is normally required in a competition case. Therefore, there are strong arguments for allowing more flexibility in funding arrangements in representative actions when the current CFA arrangements are inadequate. There may be cases where, currently, a CFA arrangement is not available or, as seems more likely, not available for the whole case.<sup>36</sup>
- 8.6 The same reasons for allowing a percentage increase of more than 100 per cent in representative actions may apply in certain competition cases brought on an individual basis. It can be strongly argued that there is a public interest in having important legal issues settled and in addressing anti-competitive behaviour more generally. Currently, the unavailability of a CFA and/or third party funding for certain complex individual actions may result in well-founded claims not being brought.

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<sup>36</sup> For instance, barristers are less likely to undertake complex competition cases on a CFA basis.

- 8.7 The OFT takes the view that a percentage increase of more than 100 per cent may be justified, depending on the circumstances of the case, in private actions in competition law. A factor which may be taken into account to assess whether a percentage increase of more than 100 per cent is justified could be whether the circumstances of the case are such that a lower percentage increase would be inadequate, for instance because of the complexity and novelty of the legal issues.
- 8.8 The question arises as to whether the increase in excess of 100 per cent should be paid by the defendant or should be deducted from the damages recovered. Although claimants would not obtain full compensation where a deduction is made from the damages recovered, the counterfactual may be that no case is brought (and therefore no compensation recovered) at all. Furthermore, it would seem disproportionate to impose a further cost on the defendant in circumstances in which it may have been entirely reasonable for him to defend the claim. However, this may not be true in all cases. While the considerations above suggest that the default position should be that the percentage increase in excess of 100 per cent should be deducted from the damages recovered, the court could be given the power to order that it should be paid by the defendant in appropriate cases.
- 8.9 The OFT is not suggesting that the percentage increase should be above 100 per cent in every private action in competition law. Funding arrangements in representative actions should be subject to judicial supervision and could be reviewed, for example, at permission stage.<sup>37</sup> The court should have the power to enquire into the fairness and adequacy of any funding arrangement and disallow any excessive percentage increase at an early stage where appropriate. The same should apply to other competition cases, where the court should have the power to review the funding arrangement either *ex ante* or *ex post*.

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<sup>37</sup> See paragraphs 4.4 and 7.30 above.

8.10 In conclusion, the OFT recommends that the Government consult on the possibility of allowing a percentage increase of more than 100 per cent in CFAs in competition cases, subject to judicial supervision of the funding arrangement.

### **Costs-capping and cost-protection**

8.11 The Discussion Paper suggested that in order to ensure predictability and to cap liability at a level that does not deter well-founded claims, there may be scope for a structured use of costs-capping orders in competition actions.<sup>38</sup>

8.12 The majority of those who commented on this option supported it. They agreed that the court should exercise its discretion as to costs-capping as early as possible in proceedings. Others went further and suggested that this discretion should be codified into the CPR in England and Wales.

8.13 Other respondents submitted that they were satisfied with the current general costs rules and argued that a special case had not been made as to why they should be changed for competition cases. Others argued that codifying the criteria for costs-capping could undermine the flexibility and discretion which the courts require to tailor any order to the circumstances of an individual case. It was argued that most courts would be unable to make a meaningful assessment of costs at an early stage and capping the claimant's costs at the wrong level would result in an inappropriate burden being placed on the defendant, who in turn would settle an unmeritorious claim.

8.14 The OFT acknowledges that issues relating to costs-capping are likely to be litigated and generate costs. However, in the OFT's view, there may be benefits in capping costs in certain cases that outweigh the potential shortcomings.

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<sup>38</sup> In Scotland, courts do not currently have jurisdiction to make costs-capping orders.

- 8.15 Costs-capping can reduce incentives to run up costs and, therefore, encourages parties to conduct litigation efficiently. Furthermore, costs-capping provides claimants with certainty as to their potential exposure if the case is lost. In the absence of such certainty, meritorious cases may not be brought given the risk of significant costs exposure towards the other parties.
- 8.16 The OFT recommends that the Government consult on the possibility of either codifying or, in Scotland, introducing measures allowing for, the courts' discretion to cap parties' costs liabilities in competition cases.
- 8.17 In some cases, and representative actions in particular, it may be appropriate to cap the claimant's liability for the defendant's costs at zero, thereby achieving cost-protection. Accordingly, the OFT also recommends that the Government consult on providing for the courts' discretion to give the claimant cost-protection in appropriate cases.
- 8.18 The proposals with regard to costs-capping and cost-protection could be confined to representative actions, as representative actions have a greater public interest dimension and the counterfactual is often that no action is brought at all or a small number of those who have been harmed are compensated.

### **Litigation funding**

- 8.19 The Discussion Paper considered that liability of a professional funder for the costs of the opposing party to the extent of the funding provided was likely to decrease the supply of funding for civil litigation.
- 8.20 The majority of respondents did not consider it appropriate to discuss funding of competition cases in isolation from issues of funding more generally and considered that professional funders of competition claims should be in the same position as funders of other types of cases.

- 8.21 The OFT takes the view that third party funding is an important potential source of funding. Subject to the constraints set out in *Arkin v Borchard Lines*<sup>39</sup> and the need for judicial supervision indicated in this Paper, third party funding should be encouraged.
- 8.22 The creation of a merits-based litigation fund for competition claims for which funding on a commercial basis is not available was not put forward as an option in the Discussion Paper but was raised informally during the consultation and is broadly in line with the proposals of the Civil Justice Council in *Improved Access to Justice: Funding Options and Proportionate Costs* (June 2007) in relation to England and Wales.<sup>40</sup>
- 8.23 A merits-based litigation fund would have the advantage that meritorious cases which would not otherwise be brought could proceed. The fund could finance the number of cases needed to develop a solid base of case law that will provide a clear framework for obtaining redress through settlement or otherwise. Businesses would not be exposed to ill-founded claims, as a merits test for the provision of funding would guard against this. The general case management powers would be available to the court in any event.
- 8.24 Financial modelling would be required to assess the viability of such a scheme. The fund could become self-financing through selection of meritorious cases, but it is acknowledged that the fund could deplete itself if it were to lose a number of cases.
- 8.25 The fund would most likely not finance all the costs and disbursements in a case. A requirement for the fund to intervene should be that funding on a commercial basis is not available. Therefore, a fund would be unlikely to finance the claimant's lawyers' costs if a CFA is available and viable. Equally, the fund would not finance disbursements or experts' fees if third party funding is a viable alternative. There may be cases,

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<sup>39</sup> *Arkin v Borchard Lines* [2005] EWCA Civ 655.

<sup>40</sup> See <http://www.civiljusticecouncil.gov.uk/>.

however, where a CFA arrangement is not available or, as seems more likely, not available for the whole case or where third party funding is not available.

- 8.26 A number of complex issues would have to be addressed before such a litigation fund could be introduced. They include who should administer the fund, whether the fund should have cost-protection and the ways in which the fund could be rewarded (for instance, through a claim to a share of the other party's costs, a share of the damages recovered, a multiple of the funding provided or a percentage increase on the damages paid by the defendants). The OFT recommends that the Government consult on these issues.

### **Other funding options**

- 8.27 CFAs, a merits-based litigation fund, and third party funding are not the only options for funding collective actions. A number of options are recommended by the Civil Justice Council in *Improved Access to Justice: Funding Options and Proportionate Costs*. The OFT recommends that the Government gives serious consideration to the Civil Justice Council's recommendations in the context of representative actions in competition law in the UK.

## 9 THE INTERFACE WITH PUBLIC ENFORCEMENT

### Leniency and disclosure

- 9.1 The Discussion Paper reiterated the OFT's commitment to ensuring that the leniency programme<sup>41</sup> is not undermined through disclosure of leniency documents.
- 9.2 The majority of respondents were supportive of this. They argued that it was important that the leniency regime was protected and that its attractiveness was not undermined. The prospect of disclosure of leniency documents could have a negative impact on the quality and comprehensiveness of leniency applications or even dissuade such applications altogether.
- 9.3 A minority of respondents felt that preventing disclosure of leniency documents would risk distorting the facts to be determined by a court. Others felt that as leniency applicants would not be able to take a different position in court proceedings to that taken in their leniency application, the disclosure of leniency material was unlikely to be prejudicial.
- 9.4 The effectiveness of the leniency programme is of paramount importance from a public interest point of view. As stated in the Discussion Paper, the leniency programme is an essential tool in the investigation of

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<sup>41</sup> Leniency applicants may qualify for immunity (that is, 100 per cent leniency) or for some lesser form of leniency. On leniency, see Chapter 9. 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.

cartels. If undertakings are discouraged from applying for leniency due to the risk of private actions, it is likely that a smaller proportion of cartels will be uncovered. This, in turn, would reduce the scope for follow-on actions in cartel cases. 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.

- 9.5 The OFT recommends that a power be conferred on the Secretary of State to provide, by Statutory Instrument, that leniency documents, appropriately defined, are excluded from use in litigation without the consent of the leniency applicant. The scope of the exclusion could be considered in further detail in any Government consultation document but the exclusion should apply irrespective of whether the OFT proceeds to an infringement decision. The power could be exercised on the advice of the OFT.

#### **Leniency, liability for damages and contribution**

- 9.6 The Discussion Paper raised the issue of whether a compliance culture could be encouraged through granting immunity recipients some form of relief from joint and several liability and put forward two options for consideration. The first was the removal of joint and several liability from the immunity recipient, so that it is only liable for the harm it caused. The second was to allow claimants to bring an action against an immunity recipient, whilst empowering the court to allow that immunity recipient to seek contributions of up to 100 per cent from non-leniency recipients.
- 9.7 Many respondents supported the first option. They agreed that it enhanced the incentive to apply for leniency such that further cartels would be exposed. Applicants would not risk coming forward at the OFT stage only to face the same risks as other cartelists in any follow-on action. Some respondents favoured the second option of allowing the immunity recipient to take contribution actions against non-leniency recipients, but others argued that this would not provide immunity recipients with the same certainty and incentives as the first option. The

second option would create contingent liabilities and would lead to further litigation.

- 9.8 Removal of joint and several liability from immunity recipients, so that they are only liable for the harm they caused, would allay concerns that potential applicants for immunity have about having to compensate the whole of the loss caused by the cartel. A maintenance of, or increase in, the level of leniency applications would promote detection of cartels and promote follow-on actions. Although it can be argued that the introduction of such protections could itself lead to litigation (in that claimants will have to sue a greater number of defendants in order to recover the whole loss), in practice other cartelists may be joined in to the proceedings in any event or the claimant may sue another cartelist who is jointly and severally liable.
- 9.9 The OFT recommends that a power be conferred on the Secretary of State to provide, by Statutory Instrument, that immunity recipients are not jointly and severally liable with the other wrongdoers so that immunity recipients are only liable for the harm they caused. The power could be exercised on the advice of the OFT.
- 9.10 Consideration could also be given to providing the immunity recipient, in exceptional circumstances, with total immunity from civil liability in the UK. However, it must be recognised that if some defendants are totally protected from civil liability, they will be able to keep the gains from their cartel behaviour. Immunity recipients, by definition, are not required to pay any administrative fine. If this option is taken forward, a power could be conferred on the Secretary of State to provide for a mechanism whereby, in exceptional circumstances when the public interest so requires, immunity recipients are given total immunity from civil liability in the UK. The power could be exercised by Statutory Instrument on the advice of the OFT.

## 10 CONSISTENCY OF POLICY

### Status of OFT decisions and guidance

- 10.1 The Discussion Paper suggested that a provision be introduced into the CA98 requiring UK courts and tribunals to 'have regard' to UK NCAs' decisions and guidance when determining competition issues to ensure the continued consistent development of competition policy in the UK.<sup>42</sup>
- 10.2 Those in support felt that the option would promote consistency of application of competition law.
- 10.3 Those not in favour felt that the courts were already giving weight to the work and views of the OFT. There was, therefore, no need for legislative action.
- 10.4 The OFT considers that 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, as envisaged by the White Paper, could become less effective. Stakeholders may find it more difficult to ensure that competition policy takes appropriate account of market developments and advances in economic thinking. The development of competition law could become more haphazard and less consistent, raising uncertainty and costs for business. In the OFT's 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 unnecessarily.

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<sup>42</sup> For example, under section 52 of the CA98, the OFT is under a duty to publish advice and information about the application and enforcement of the CA98 and Articles 81 and 82 of the EC Treaty.

- 10.5 The proposal has clear benefits. It promotes consistency of policy in areas where the law is unclear. It removes an anomaly in the system. Currently UK courts and tribunals have a duty to have regard to guidance and decisions by the European Commission but not by UK NCAs. There appears to be no reason for this different treatment. Furthermore, requiring UK courts to have regard to guidance and decisions by UK NCAs would enhance legal certainty and thus reduce compliance and litigation costs.
- 10.6 There would not appear to be any real drawbacks to this proposal. The OFT considers that any argument that it would fetter the court's jurisdiction would be misplaced. A duty to 'have regard to' would merely impose a duty to 'give serious consideration to'. The proposal, if implemented, would not mean that the court is bound. Furthermore, the court already has a duty to have regard to the European Commission's decisions and guidelines in cases even where there may be no effect on trade between Member States.<sup>43</sup> This duty has not led to a fettering of the courts' jurisdiction in theory or in practice.
- 10.7 The argument that courts have regard to UK NCAs' guidance and decisions already is not conclusive. Courts do not have to explain why they depart from a statement in guidance or a decision. With a greater number of private actions, it may become more difficult to reconcile different precedents. It is important, therefore, that departures or differences from policy statements or decisions by UK NCAs are adequately explained in the interest of legal certainty.
- 10.8 The OFT recommends that UK courts and tribunals should be required to 'have regard' to UK NCAs' decisions and guidance.

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<sup>43</sup> This indicates that the only (or main) rationale behind section 60(3) of the CA98 is consistency and not the primacy of EC law. It would be paradoxical if, for example, a UK court were required by statute to have regard to a decision or guideline of the European Commission but not to a more relevant decision or more relevant guidance from a UK NCA.

## 11 EFFECTIVE CLAIMS RESOLUTION

### Introduction

- 11.1 As stated in the Discussion Paper, in many cases, early resolution of competition claims by means of a settlement made between the parties, whether facilitated by a third party or otherwise, 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.<sup>44</sup>

### Allowing county courts in England and Wales to hear lower value competition claims

- 11.2 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, they are assigned to the Chancery Division.
- 11.3 The Discussion Paper considered that this might lead to higher costs which may arguably discourage claimants from commencing private actions. It put forward the possibility that lower value claims might be facilitated if they could be issued in county courts in England and Wales at Chancery District Registries, subject to the possibility of transfer to the High Court if the claim raises complex competition law issues.

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<sup>44</sup> Although early resolution by way of settlement is generally to be encouraged, whether it is appropriate in a particular case is something that would need to be explored and weighed up in each individual case.

- 11.4 A minority of respondents were in favour of this option. Those in support felt that it was important to have flexibility to deal with different factual situations and to ensure that putting competition law into effect was not excessively difficult. Other respondents expressed concern that indirect purchasers in the county courts would not be able to prove liability and quantification of loss as this would be beyond the resources of the average consumer. One supportive respondent suggested that a specialist judge could be placed at the disposal of county courts to assist in complex cases.
- 11.5 The majority of those not in favour said that county courts do not have experience of dealing with complex competition claims and that the option would introduce an unnecessary layer of complexity and uncertainty. Others felt that inexperienced county courts would simply refer competition claims to the High Court, thereby introducing delays into the claims process. Many respondents indicated a preference to extend the CAT's jurisdiction to hear lower value claims, rather than the jurisdiction of county courts.
- 11.6 Although we consider that there is merit in this proposal, we consider that further investigation is needed against the background of the Ministry of Justice's objective of creating single Civil Courts with unified jurisdictions.<sup>45</sup> We therefore do not recommend that this option be taken forward in any Government consultation at this stage.

#### **Introducing a pre-action protocol for competition claims**

- 11.7 As set out in the Discussion Paper, a key feature of the civil justice system in England and Wales is to encourage early exchange of information between the prospective parties to proceedings to allow the claim to be fully investigated and, if possible, resolved without the need for litigation. This is achieved partly through the use of pre-action protocols. Pre-action protocols set out codes of good practice, which

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<sup>45</sup> See [http://www.dca.gov.uk/consult/civilcourt/civilcourt\\_cp0605.htm](http://www.dca.gov.uk/consult/civilcourt/civilcourt_cp0605.htm).

parties should follow when litigation is being considered. There is currently no pre-action protocol applicable to competition claims but the Civil Justice Council has consulted on proposals to introduce a consolidated pre-action protocol in England and Wales<sup>46</sup> which, if adopted, would apply to competition cases. It was suggested in the Discussion Paper that if a consolidated pre-action protocol were adopted, it might be appropriate to introduce a specific annex for competition cases.

- 11.8 The majority were in favour of this option and indicated that a protocol would assist in clarifying procedure in the early stages of a claim when a claimant requires the most certainty and would correct any information asymmetry problems.
- 11.9 A few respondents felt that a special protocol for competition law was not required and as competition cases were fact specific, there may not be the necessary commonalities for the establishment of a pre-action protocol.
- 11.10 The Civil Justice Council's consultation on a consolidated pre-action protocol in England and Wales closed on 27 April 2007 and its conclusions are awaited.
- 11.11 In Scotland, there are no exact equivalents to the pre-action procedures in England and Wales although there is a procedure in place under the commercial procedure.<sup>47</sup> As in England and Wales, there may be benefits in introducing a pre-action procedure for representative actions in relation to competition law claims more generally, to facilitate an early

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<sup>46</sup> See [www.civiljusticecouncil.gov.uk/1074.htm](http://www.civiljusticecouncil.gov.uk/1074.htm).

<sup>47</sup> Under the Court of Session's commercial procedure, there is a practice note (Practice Note No 6 of 2004) which requires an exchange of information between the parties before an action is raised. This is not, however, available in the ordinary procedure.

exchange of information between the prospective parties and a settlement if appropriate.<sup>48</sup>

### **Competition Ombudsman**

- 11.12 Consideration was given to the possible establishment of a Competition Ombudsman. It was suggested that the Competition Ombudsman would not be bound by legal rules applicable in the courts as to causation and quantum, but would be able to recommend that an infringing undertaking make a monetary payment (in such amount that 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 that the Ombudsman considers just and appropriate (whether or not a court could order those steps to be taken). The availability of such a body could encourage ADR, reducing the costs on the claimants associated with lengthy court cases.
- 11.13 There was some support for this proposal. In particular, it was considered that it might encourage consumers and small businesses to address anti-competitive behaviour by improving the chances that their claim would be settled relatively easily and inexpensively.
- 11.14 The majority of those who commented did not favour implementing this measure. Their view was that it might complicate matters and could add an additional layer of bureaucracy and cost. Another potential concern was that it could threaten the consistency and coherence of the competition law regime. Others considered that it was premature, given that private actions in the UK were still in their infancy.
- 11.15 The OFT considers that there is some merit in this option. Key issues would include how such a scheme would operate cost-effectively across all sectors of the economy and how it would be funded. We consider that further experience of adjudication and settlement of competition

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<sup>48</sup> Promoting early resolution of disputes is also an area being considered by the review of Civil Courts in Scotland.

cases is required before this proposal can be implemented effectively. The establishment of an Ombudsman is neither a necessary nor a sufficient condition for individual cases to be settled. In light of these considerations, we take the view that this option should be kept under review rather than included in any Government consultation document at this stage.

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

- 11.16 One of the issues that was raised in the Discussion Paper was whether, as part of the OFT's 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 competition infringements.
- 11.17 Mixed responses were received with respect to this issue. Those in support felt that compensatory payments which were deducted from any fine would cut out costly and time-consuming private litigation and provide immediate redress to those who had suffered loss. Consumer compensation could be assessed during the administrative settlement of a case where it was likely to be difficult to bring a representative action or where the loss suffered by individual consumers was very small.
- 11.18 However, doubts were expressed as to whether consumer compensation should be a mitigating factor in the setting of fines by public enforcers. It was argued that the making of a 'donation' would not prevent private actions, and this was likely to frustrate defendants who believed that they were being penalised twice for the same infringement. Other respondents felt that OFT involvement in negotiating redress had the potential to add a layer of complexity and suggested that the OFT would be unable to factor in the legal principles relevant to establishing and measuring loss (for example, whether the loss had been passed on or otherwise mitigated). It was also mentioned that it was highly unlikely that an undertaking would volunteer to make redress.

11.19 The OFT's policy on direct settlement is developing, in light of its experience to date and discussions with the European Commission and other NCAs. The issues which arise are likely to become apparent only in individual cases. Accordingly, we believe that this issue is best left for consideration and development by the OFT, in light of experience gained and to be gained in a variety of scenarios.

## 12 EU ISSUES

### Status of the decisions of other EU NCAs

- 12.1 The Discussion Paper considered two main options for providing for a binding effect of the infringement decisions of EU NCAs (other than the European Commission and UK NCAs): on an EU-wide basis or on a reciprocal basis.
- 12.2 Those respondents that favoured the first option considered that it ensured consistency of decision making (as between NCAs and national courts), would encourage private actions and would lead to a system of mutual recognition. Others suggested that other EU NCAs' decisions should only be binding on UK courts if the decision concerned the UK and the defendant was part of the same enterprise against which the other EU NCA's decision was made.
- 12.3 Many respondents considered that decision making by other EU NCAs was of a variable standard. Decisions were likely to have been taken in a legal system with differing legal concepts to that in the UK. Furthermore, it was claimed that decisions from other Member States were unlikely to have a significant UK element to them as there was a mismatch between the findings of an other EU NCA in respect of its own country and issues relevant to a damages action in the UK. However, other respondents pointed out that a decision by other EU NCAs was likely to have persuasive value for a court in a different Member State. It was suggested that there was no reason why a claimant relying on a decision from another Member State could not bring their claim in a court of that Member State and then enforce any judgment in the UK.
- 12.4 The OFT acknowledges concerns that problems relating to the scope and meaning of other EU NCAs' decisions could limit the usefulness of the proposal and generate a certain amount of litigation. However, such costs are expected to be lower than the costs of re-litigating the infringement issues. The same applies to translation costs. The OFT considers that consumers and small and medium-sized businesses, in

particular, are unlikely to take action in a foreign court and then seek to enforce the judgment in the UK under Regulation 44/2001.<sup>49</sup>

- 12.5 Few respondents supported the second option. Those that did support it pointed out that adequate appeal rights on issues of fact as well as on law and procedure were essential. Other comments were similar to those made in respect of the previous option.
- 12.6 The OFT considers that providing for the binding effect of infringement decisions of other EU NCAs is an important proposal. If decisions of NCAs were binding on national courts, evidentially and legally complex cases would not have to be re-litigated. It would increase certainty for parties to a claim and greatly reduce the burden on the claimant to prove an infringement. It would save costs and put those who have been harmed in different jurisdictions on an equal footing with one another. Furthermore, this proposal is not without a European precedent, with a similar concept having been implemented in Germany.<sup>50</sup> Ultimately, this proposal would go a long way to facilitating private actions under EC competition law.
- 12.7 However, the OFT considers that this proposal is best taken forward at EU level. There is clearly merit in a level playing field in the EU and a set of unilateral initiatives could complicate rather than simplify matters.

#### **Indirect purchaser standing and 'passing-on'**

- 12.8 As regards indirect purchaser standing, the Discussion Paper considered that it would not seem to be appropriate for there to be any limitation on the standing of consumers and other end-users to bring a competition claim.

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<sup>49</sup>Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16 January 2001, page 1.

<sup>50</sup> Section 33(4) of the German Act against Restraints of Competition.

- 12.9 The majority were in favour of this option and agreed that the class of claimant that could start proceedings should not be limited.
- 12.10 Other respondents indicated that they would prefer to let the courts decide whether to permit an indirect purchaser to claim in a particular case.
- 12.11 As regards 'passing-on', the Discussion Paper suggested that the claimant should be required to prove that he had suffered loss but that the burden of proof in respect of 'passing-on' should always lie with the defendant.
- 12.12 Respondents were generally supportive of this option and said that it broke down one of the obstacles to bringing a claim. Furthermore, as this was a defence, it was appropriate that the defendant should prove it. However, much of the support for this option was subject to the defendant being able to access the claimant's costs and pricing information in order to establish the extent of passing-on.
- 12.13 Other respondents contended that it was inconsistent with the basic principles of justice that claimants need to establish liability and that defendants would be disadvantaged in terms of the information available to them.
- 12.14 The OFT takes the view that, as a matter of policy, it is appropriate to place the burden on the defendant to prove that overcharges have been passed on. Implementation of this option would clarify the position and remove uncertainty for claimants. However, there is a risk of erroneous decisions if defendants are unable to prove passing-on when passing-on in fact occurred. In the absence of a consolidation mechanism (or other means of ensuring consistency), there is a risk of the defendant having to pay multiple damages if direct and indirect purchasers recover. Therefore, if this proposal is to be taken forward, consideration should be given to mechanisms for consolidation of cases and apportionment of damages among direct and indirect purchasers.

12.15 The OFT considers that the issues of indirect purchaser standing and passing-on are complex, but nevertheless need to be tackled. There are, however, differences in view as to what should be done and there is a recognition that there are EU-wide implications. The OFT considers that the most appropriate forum in which to deal with this issue is in the context of discussions on the forthcoming European Commission White Paper on damages actions for breach of the EC antitrust rules and any resulting EU measure. Any reforms implemented at national level should be consistent with the approach adopted at EU level.

## 13 CONSUMER AND BUSINESS INFORMATION

- 13.1 The Discussion Paper suggested that, in order to raise awareness of the possibility of private actions and the importance of settlement at an early stage, it might be appropriate for the OFT to undertake additional advocacy activities, including publication of information of a general nature about private actions.
- 13.2 The great majority welcomed this suggestion and took the view that raising consumer awareness of the options available to them in relation to taking a private action in competition law was essential. However, a very small minority considered that preparation of consumer and business information would not be a beneficial use of the OFT's time.
- 13.3 The OFT notes that under section 6 of the EA02, the OFT has the function of 'making the public aware of the ways in which competition may benefit consumers in, and the economy of, the UK'. It also notes that a 2006 survey into business awareness of the competition regime indicated that almost 90 per cent of respondents believed their knowledge of the competition legislation to be 'not very much' or 'nothing at all'.<sup>51</sup> Accordingly, the OFT intends to take this option forward separately. It will not, however, provide legal advice or assist in individual competition law cases.

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<sup>51</sup> *Competition Act and Consumer Rights*, Synovate, May 2006 at page 75.