ORRICK

**Response to BIS consultation**

**Private actions in competition law: a consultation on options for reform**

## A. INTRODUCTION

We welcome the opportunity to comment on the consultation paper. We acknowledge the scope for improvement of the current regime and we support efforts to reform the system. We have concerns, however, with regard to some of the proposals set out in the consultation paper, in particular those relating to collective actions and the introduction of a fast-track for SMEs.

**By way of introductory comments:**

- **Any changes to the English legal framework for antitrust damages actions should be carefully drafted to ensure consistency with EU law.**
- **The overall effect of a revised legal framework – notably, the impact on cartel deterrence and cartel leniency programs - should be assessed in detail to avoid an increase in private enforcement at the cost of reduced public enforcement.**
- **The Government should resist the temptation to introduce a piece of legislation which may promote certain policy objectives, such as an improved legal environment for SMEs, but which gets shot down and is rendered useless at its first encounter with an English or EU court. This is, of course, what happened to s.47A Competition Act 1998, the flagship legislation introduced in 2003 to promote private enforcement in the UK.**

## B. THE COMPETITION APPEAL TRIBUNAL (Q.1- Q.3)

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

We are in favour of this proposal. See response to Q.2 below for further comments.

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

Yes. There are significant advantages in having a specialist forum such as the Competition Appeal Tribunal ("CAT") which understands complex competition issues and is familiar with handling large volumes of economic evidence. Currently, the CAT is not being used to best advantage. We note that, since January 2011, only one new follow-on action has been filed with the CAT.

There are a number of reasons for the unpopularity of the CAT, several of which are described in Section 4 of the consultation paper. In essence:

- The CAT's jurisdiction is limited by the fact that it can only take on damages actions brought on the back of infringement decisions issued by UK or EU competition authorities ("follow-on cases").

- Moreover, the ruling in *Enron v EWS (I)*[1] confirmed that the CAT has an extremely limited scope to find outside the original infringement decision. Any action brought before the CAT must be strictly limited to the findings in the underlying decision. This acts as a straitjacket on the claimant's ability to argue its case. *Enron v EWS (I)* reinforced this effect by confirming that the CAT will interpret infringement decisions narrowly. As a result, s.47A of the Competition Act has become a piece of legislation with little application, except that it allows an extended limitation period for claimants who are out of time in the High Court. Accordingly, s.47A should be disapplied and replaced by an alternative which does not distinguish between follow-on and stand-alone cases.

Limitation periods: In the event the CAT's jurisdiction is brought into line with that of the High Court, it would be appropriate also to harmonise their respective limitation periods. The High Court's six-year limitation period should not be changed, since this is a standard time limit across virtually all areas of litigation, not just antitrust. Instead, the CAT should have, we propose, two alternative limitation periods: (i) the High Court's six-year limitation period should apply in the CAT; and (ii) in addition, a two-year limitation period should apply starting from the time of the European Commission or the Office of Fair Trading's infringement decision. The two-year period represents a reduction to the CAT's current limitation period, which ends two years after the right of appeal has been exhausted, a system which, in practice, may give claimants up to a decade to bring a claim after they found out about the cartel or other underlying antitrust infringement. Arguably this creates unreasonable uncertainty for defendants and can easily be addressed by taking the start of the two-year period back to the date of the infringement decision.

3 **Should the CAT be allowed to grant injunctions?**

We agree that, in order to strengthen the role of the CAT, it should be given the power to grant injunctions in support of proceedings. This is consistent with our suggestion to permit the CAT to hear stand-alone claims and to take on a role more similar to that of the High Court.

[1] *English Welsh & Scottish Railway Ltd v Enron Coal Services Ltd* [2009] EWCA Civ 647.

## C. FAST-TRACK MODEL FOR SMALL AND MEDIUM ENTERPRISES (Q.4- Q.6)

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

We oppose the proposals to establish a fast-track model in the CAT for small and medium enterprises ("SMEs"). The consultation paper suggests that, under these proposals, fast-track cases would reach trial within a recommended time limit of six months. We do not believe that it would be possible to reach trial within this period without severely compromising quality and legal certainty.

Given the secretive nature of cartels, a claimant will have little chance to prove its case without disclosure, because virtually all relevant documents will be within the defendant's control. Any attempt to cut short the disclosure stage of proceedings would actively damage claimants' interests, including those of SME claimants, by making it more likely that crucial evidence of the cartel would be overlooked. Defendants would also suffer, as a carefully argued defence, together with disclosure, will be essential to address often complex areas of law, economics and facts. Moreover, parties should generally be encouraged to have a sensible discussion and reach agreement on how to limit the scope of disclosure to certain types of documents. A rushed timetable would prevent this and, as a result, the parties might end up taking a wider approach to disclosure than is necessary in the circumstances of the case, at considerably greater cost to the parties.

Moreover, antitrust judgments do not only determine the dispute at hand but can also bind parties to future proceedings, notably in abuse of dominance cases where a fast-tracked investigation involving only a superficial consideration of the issues would be capable of setting a binding precedent and could have a severe impact on the commercial strategy of some of the world's most successful companies. It is unrealistic to think that a judge could be presented with sufficiently robust evidence in six months to hold a company in abuse of a dominant position, when such decisions take six years for competition authorities to reach.

Furthermore, given the inevitably haphazard nature of any six-month antitrust damages action, this proposal would be contrary to the interests of justice and would risk undermining the excellent global reputation enjoyed by the English courts as a forum for international disputes where even unsuccessful litigants tend to feel, at the end of proceedings, that they have had a proper hearing. The fast-track proposal would move the judicial system closer to what is best characterised as a "flip-the-coin" system: whilst the process would be fast and cheap – certainly available to everyone - the outcome would be uncertain and parties are unlikely to be left satisfied that they have had their day in court.

The Government should also consider whether the proposed fast-track model might face legal challenges based on the fundamental right to a fair trial.

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

We oppose the proposed cap on claimants' liability for costs on the basis that it would put pressure on defendants to settle even weak claims. The alternative would be to run up costs which could not be recovered after trial, even if the claimant's case was found to be without merit. This would create the potential for businesses to be threatened with "blackmail suits", where claims are brought without sound basis in facts and evidence and where defendants may be reluctant – for reasons entirely unrelated to the case before the court – to have internal documents disclosed and read out in open court and to have senior management examined as witnesses.

Placing an emphasis on injunctive relief would not solve the problems referred to at Q.4 above, since the CAT would still need to consider the merits of the claim. Moreover, as injunctive remedies can seriously harm a defendant's business, taking damages off the table would in no way justify a lower level of scrutiny from the CAT.

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

An alternative may be to give the CAT wider powers, similar to those of the High Court under the Civil Procedure Rules, to manage and cap costs on an ongoing basis during proceedings. This would give the CAT the scope to protect SMEs from excessive costs whilst remaining more flexible than the fast-track model outlined in the consultation paper.

Separately, we consider that some SMEs may take an overly optimistic view of their own potential antitrust claims. This is often the result of viewing potential claims through too narrow a lens, for example, by failing to account for constraints on large companies coming from competitors or the threat of new market entry, for example from low cost manufacturers in Asia. The fact that many SMEs believe that they have legitimate antitrust claims does not mean that this is true in all cases. Caution is therefore required, particularly if other steps are going to be taken (such as the introduction of a fast-track for claims) which could constrain larger businesses from launching a solid defence.

## D. PROVING DAMAGES (Q.7- Q.8)

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

Reversing the burden of proof in relation to loss could risk weighting the system too heavily against defendant businesses and might have the unintended consequence of discouraging cartel whistleblowers. Claimants already have tools under English law to assist them in proving damages, including a wide duty of standard disclosure and the option to apply for specific disclosure.

We understand that several other EU Member States allow their courts a degree of discretion when it comes to the standard of proof for damage. In Austria, for instance, if the exact amount of damage is impossible or unreasonably difficult to establish, the judge may assess the damage on the basis of his "freier Überzeugung" (roughly translated, "free conviction"). Italian courts, meanwhile, will be permitted to carry out an equitable assessment where the existence of damage is not in doubt but it is not possible to prove the amount of the damages. Allowing the CAT to exercise this kind of discretion would allow for more flexible and tailored solutions than introducing a blanket presumption of loss.

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

We agree with the Government's position at paragraph 4.49 of the consultation paper that there is no strong case for addressing the passing-on defence in law at a national level. It would be preferable for this issue to be resolved at the EU level to ensure consistency across Member States.

**E. COLLECTIVE ACTIONS (Q.9- Q.23)**

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

The current collective action regime is clearly not working well, given that only one representative action has been brought to date. However, we recommend that BIS should reform the system without the introduction of opt-out collective actions.

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

We strongly oppose extending the collective actions regime to include opt-out collective actions. Please see further comments below under Q.14.

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

We agree that it should be possible to bring collective actions on behalf of businesses as well as consumers, provided that this is accompanied by appropriate certification and case management. It is likely that this would increase take-up of collective actions, since businesses have a greater incentive to take steps against anti-competitive behaviour than individual consumers.

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

We do not consider this to be a major concern. Given the involvement of external antitrust counsel in any such action, we do not view opt-in (or opt-out) class actions as a risk area for cartels or other anti-competitive conduct, and we see no reason why the standard rules relating to information exchange should not be adequate in this context.

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

In theory, we do not see any reason to limit collective actions to follow-on cases. However, we would not expect there to be much appetite for stand-alone collective actions, given i) the difficulties involved in proving a claim where there is no existing infringement decision to rely on; and ii) the fact that public awareness of competition infringements is likely to be low unless a public enforcement decision has already been issued.

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

We are opposed to any proposals to allow opt-out collective actions. We consider that these would give rise to a number of issues, many of which are referred to in Section 5 of BIS' consultation document. Here we focus on one of those, namely the strong likelihood of overcompensation resulting from such claims, since, no matter how well the collective action is publicised, far from everyone within the class of potential claimants will come forward. This leaves the question of what to do with unclaimed funds, which is likely to be controversial. BIS discusses a number of possible options in Annex A to the consultation paper. We consider, however, that all of these options are problematic to a greater or lesser extent.

We agree with BIS that redistribution of surplus damages to existing claimants would not be desirable. It would result in individual claimants receiving compensation in excess of the level of damage that had been shown in court, and so would infringe the fundamental principle of English law that claimants should not be enriched by damages actions.

We also agree that unclaimed funds should not revert to the defendant. In a situation where large sums in damages were unclaimed and reverted to the defendant, resulting in a minimal change in position, it would be hard to avoid the perception that the action was an unjustified waste of time and costs.

BIS inclines towards the view that unclaimed sums should be paid to a single specified body, which it argues is important in order to maximise deterrence. We are, however, uncomfortable with this reasoning. There is already an adequate mechanism to punish businesses which are found to have infringed competition law, through the imposition of cartel fines by the UK's Office of Fair Trading ("OFT"), and an uplift for deterrence is built into the way in which the OFT calculates those fines. There is therefore no need to impose a further mechanism for

deterrence by retaining sums which have not been claimed by members of the class[2]. Moreover, if nobody comes forward to claim a sum of damages in compensation for their loss, then the retention of those damages arguably becomes punitive rather than compensatory. This challenges the fundamental principle of English law that damages are aimed only at compensating loss, and could almost be seen as exemplary damages by the "back door".

We are also unconvinced that it is the function of private damages actions to serve wider social purposes such as advancing access to justice, as is suggested by BIS. On the contrary, private damages are a matter between the parties to the action.

In the end, the groups that would benefit from an opt-out system would be class-action lawyers and funders. The cost claims are likely to be high: in a recent case before the United States District Court, Northern District of California, the class action lawyers claimed $100 million in costs. We would advise the Government to consider carefully whether this is a cause worthy of legislation.

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

We do not agree that opt-out collective actions should be permitted but, if they were, stringent criteria for judge-led certification would be necessary. Otherwise, claims with no real prospect of success could reach trial, resulting in a considerable waste of time and expense. The suggested list of issues for certification is broadly equivalent to the qualification criteria used in Canada, which are generally regarded as being effective.

Another issue to consider is whether court approval should be required to dismiss a class action after it has been filed if the claimants decide not to move forward with the claim. This is required in the U.S. where it acts as a disincentive for claimants to file class actions without proper assessment being given to the merits of the claim.

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

Treble damages should be prohibited in any event. The current principle that claimants should not be enriched through damages actions provides a disincentive to litigation brought without a sound foundation. We note that Australia, for instance, allows opt-out collective actions but is regarded as having avoided a US-style litigation culture, at least in part because its legal system does not allow for treble or punitive damages in competition law actions. Further, in the UK, there is already a mechanism for punishment of competition law infringements, namely the ability of the OFT to impose fines. There would be a very real risk of "double"

[2]In viewing the purpose of private damages actions as compensation, not deterrence, we are broadly in line with the European Commission's position. In its *White Paper on Damages actions for breach of the EC antitrust rules* (2008), the Commission stated that the first and foremost guiding principle of private damages is full compensation for victims (p. 3). "Compensatory justice" (to use the Commission's phrase) may inherently produce other beneficial effects, such as deterrence of future infringements, but these are secondary to the compensatory principle.

punishment of businesses if they could be subjected to both cartel fines and punitive damages.

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

Yes, this rule should be maintained. It provides an important safeguard against the temptation for claimants to speculate by bringing claims which have a low prospect of success. The risk of an adverse costs order compels claimants to consider whether an action genuinely has a good prospect of success. The same applies to insurers brought in by claimants. If the claim does not have a good prospect of success, the claim may well be – and indeed should be – dropped due to the cost exposure. The threat of an adverse costs order therefore acts as a filter against claims which lack a solid foundation.

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

As stated in our answer to Q.9 above, we would be in favour of allowing the CAT a wider discretion to cap costs where necessary to protect SMEs from excessive costs.

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

We believe that contingency fees should be permitted in collective action cases, since they have the potential to facilitate access to justice. Care should, however, be taken in deciding which forms of contingency fee agreements to allow in this context, as some will carry greater risks than others. It is also important to analyse the overall effect of any changes to the legal framework for antitrust damages actions, to ensure the incentives for claimants to litigate do not become too strong. As noted above, the "loser pays" rule should not be changed.

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

If this system were adopted, we consider that any unclaimed sums should be paid to the Treasury rather than making a choice of charity. This would mirror the EU system where cartel fines are currently paid into the Community Budget[3].

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

If unclaimed sums were to be paid to a charitable body, they ought to be paid to a charity related to the industry affected by the cartel. However, as stated above, we consider that a

[3] See http://ec.europa.eu/budget/explained/budg_system/financing/fin_en.cfm.

more appropriate solution, and one which is in line with EU practice, would be for unclaimed sums to revert to the Treasury.

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

We do not consider that it would be appropriate to give the OFT the power to bring opt-out collective actions. This would be an inefficient use of the OFT's time. The OFT will be of greater assistance to private enforcement if it continues to concentrate on investigating and exposing cartels and abuse of dominance, thus alerting potential claimants to infringements which may have affected them, as well as relieving claimants of the burden of proving the antitrust infringement.

We also anticipate that, for reasons of time and expense, there will be little appetite to bring claims from consumer watchdogs and industry associations. These bodies are set up to represent the interests of consumers by lobbying legislators or influencing other decision makers and to advise the general public. They are not, however, set up to handle complex litigation and, indeed, such operations would be entirely foreign to their experience. In reality, such bodies would appoint a law firm effectively to run the litigation, and this law firm would presumably exercise heavy influence over any decisions made as to the course of the litigation. Thus, the difference between letting a law firm represent a class and having a consumer or trade association act as plaintiff would, in any practical sense, be limited. Giving the power to bring class actions to consumer bodies would, in practical terms, do little to mitigate concerns arising from a situation where law firms represent opt-out claims.

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

Please see our comments under Q.22 above.

## F. SETTLEMENT AND REDRESS (Q.24-30)

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

We agree that alternative dispute resolution ("ADR") should be encouraged in private competition actions, but oppose any attempt to make it mandatory. ADR will not be suitable in all circumstances and it should not be imposed on parties where positions are entrenched and it has minimal chance of success. Moreover, compulsory ADR would take time and would appear to be at odds with the plan to fast-track claims by SMEs.

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

We do not object to the introduction of a simple pre-action protocol for some or all cases in the CAT. This would encourage dialogue between parties to potential actions and could facilitate an early resolution to the dispute. Moreover, as we mention above, some potential claimants, especially SME claimants, may have an unrealistic view of the merits of their claim and their prospects of success. A pre-action protocol, by encouraging early information exchange, could enable SMEs to form a more realistic view of the strengths and weaknesses of their claim, perhaps saving them unnecessary litigation.

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

The current obligation, under Rule 43 of the Competition Appeal Tribunal Rules 2003 (as amended), to keep a settlement offer open until 14 days before trial acts as a disincentive for defendants to make settlement offers at the early stages of the litigation. At such point, critical elements of the litigation, such as disclosure and the exchange of witness statements, will not have been completed, and there may still be significant uncertainty as to the outcome of the litigation. This will discourage defendants from making formal settlement offers because, if the defendants' position improves substantially following disclosure, they may nevertheless be bound by an offer which is overly generous to the claimants.

The introduction of a parallel provision to CPR 36 would be an improvement on the CAT's current regime.

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

We have no such proposals.

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

We do not agree that this is necessarily the case. BIS's proposal that a business which wishes to settle on a collective basis could get the representative body to bring a collective action in the CAT, which could then proceed to settlement, seems unnecessarily cumbersome.

If a collective settlement mechanism were to be introduced, the model adopted in the Netherlands appears to be a good one. The requirement for the parties to the settlement to jointly petition the Amsterdam court to certify the agreement appears to be a good way to ensure that individual interests are not abused.

One issue that would need to be resolved, however, is whether a collective settlement agreement in the UK would be enforceable in other jurisdictions. The Dutch model, under which several international collective settlements have been declared binding by the Dutch court, indicates that it could be. However, it may be more appropriate for this issue to be dealt with at EU rather than UK level.

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

We are opposed to this proposal. The OFT's role is to investigate and, where appropriate, penalise infringements by imposing fines. Private enforcement plays an important, but distinct, role in allowing compensation of parties who have suffered harm from competition law infringements. We are against any attempt to blur the distinct functions of the OFT and private enforcement by trying to involve the OFT in redress.

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

No. As we state under Q.29 above, the issue of redress should be kept completely distinct from fines, not least to avoid confusion and unnecessary complexity.

The current complementary nature of the OFT and the private enforcement regime generally works well. Any change to this system would risk overstretching the OFT and prejudicing its capacity to carry out its current functions.

## G. OTHER ISSUES (Q.31- 34)

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

There is a tension between extended private enforcement and the public enforcement regime. If the private system is regarded as too claimant-friendly, cartel participants may be discouraged from making leniency applications and regulators will lose a vital source of intelligence about cartels. At present, we are satisfied that there are still strong incentives to make a leniency application, but a number of the changes discussed above, such as opt-out collective actions, could shift the balance too far. Again, it is critical to assess the overall effect of any changes to the legal framework.

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

We take the view that the Government should avoid legislative solutions in relation to the disclosure of leniency documents. This is an area where consistency with the EU is important. It is more appropriate for this to be a court-led process and, indeed, this point has already been made in the EU courts. The European Court of Justice ("ECJ") held, in its preliminary

ruling in the case of *Pfleiderer*[4], that it is for the courts and tribunals of the Member States to determine, on the basis of their national law, the conditions under which access to leniency documents must be permitted or refused. In doing so, they must weigh the different interests protected by European Union law, namely i) the right of persons harmed by competition infringements to seek redress and ii) the need to ensure the utility of leniency programmes. This approach was applied by the Commission in submissions to the High Court[5], and subsequently in the judgment of Mr Justice Roth[6], in proceedings arising from the gas insulated switchgear cartel.

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

This would provide a very strong incentive for parties to come forward with information about cartels. However, the incentives to blow the whistle are already strong and it is not clear to us that there is any real need to strengthen them further. If such protection were introduced, it should not be applied retroactively and, at most, should be extended only to the first cartel participant to come forward with information i.e. the immunity applicant.

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[4] *Pfleiderer AG v Bundeskartellamt* (Case C-360/09), judgment of the ECJ dated 14 June 2011.

[5] Observations of the European Commission pursuant to Article 15(3) of Regulation 1/2003, submitted in relation to *National Grid Electricity Transmission plc v ABB Ltd and others* (Claim No. HC08C03243).

[6] Judgment of Mr Justice Roth dated 4 April 2012 in *National Grid Electricity Transmission plc v ABB Ltd and others* [2012] EWHC 869 (Ch).