Private actions in competition law: a consultation on options for reform. Response form

The consultation will begin on 24/04/2012 and will run for 3 months, closing on 24/07/2012

When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation response form and, where applicable, how the views of members were assembled.

This response form can be returned to:

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Please tick one box from a list of options that best describes you as a respondent. This will enable views to be presented by group type.
Representative Organisation ✓
Trade Union
Interest Group
Small to Medium Enterprise
Large Enterprise
Local Government
Central Government
Legal
Academic
Other (please describe):

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

Consultation questions

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

Yes. We consider that the expertise available in the CAT is under-utilised, and that amending Section 16 in the manner proposed will rightly place the CAT in a more central role in resolving competition disputes.

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

Yes. The CAT is adept at assessing liability for breach of competition law. There is no reason, for this purpose, to distinguish between stand-alone and follow-on actions.

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

Yes, but only on the basis that the threshold for granting injunctions is not lowered from that currently adopted by the Courts.

The reason for this is that the Courts are, quite correctly, willing to grant injunctions only where strict criterion are satisfied, for example that damages will not be an appropriate remedy. Those criterion have been adopted by the Courts, over many years, in recognition of the fact that injunctions are obtrusive and a restraint on the normal operation of business. Although we support the vesting of injunctive powers in the CAT, those powers should not be exercised differently to the equivalent powers possessed by the Courts.

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

We have concerns about vesting powers in the CAT to grant swift interim injunctions to claimants. Whilst it is important that SMEs (whom we agree are perhaps more vulnerable to anti-competitive behaviour) have access to justice, safeguards must exist to ensure that a fast track route cannot be abused by SMEs to bring unmeritorious claims.

We consider that the CAT should have greater discretion to deal with cases brought by SMEs. We would support the CAT making decisions, where appropriate in individual cases, to cap costs. We do not agree that the OFT or CAT should write to the alleged infringer at the beginning of the fast track procedure, for the reasons set out in the consultation paper.

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

We support costs thresholds in appropriate cases. We consider that damage capping presents real practical difficulties, as the appropriate maximum damages award will depend entirely on the facts of each individual case.

We have discussed our views on injunctive relief above.

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

We are of the view that the measures proposed by the Government are sufficient to enable SMEs to bring competition damages actions.

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

We consider that a rebuttable presumption is unsuitable for two reasons. The first reason is that the Courts are already adept at adjudicating on issues of loss: we do not see any need to alter the approach. The second reason, related to the first, is that we anticipate a rebuttable presumption may itself add complexity to damages actions, as questions as to the effect and parameters of the presumption are highly likely to themselves be the source of argument and litigation.

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

We do not consider that there is a case for directly addressing the passing-on defence in legislation. We believe that existing principles of English law adequately address this issue. It is for an individual claimant to establish loss. If a claimant has not suffered loss, or has passed that loss on, then that claimant should not in effect be compensated for a loss it has not suffered.

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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

Again, whilst we do not comment on the need for an expanded collective actions regime, if one is introduced, restrictions of the type postulated will be necessary. The need to create such restrictions highlights why standing should not be extended to businesses capable amongst themselves of bringing about a concerted practice contrary to the competition rules.

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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

Yes. We consider policy objectives relating to punishment should be addressed through public enforcement.

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

It seems to us inevitable, in view of the forthcoming abolition of recoverability of premiums for After The Event insurance, that if collective actions of the type contemplated are introduced, they would require the involvement of litigation funders on the side of claimants. We do not object to that, but note that both claimants and defendants need protection against funders attempting to avoid liability for a successful defendant's costs on the basis that the funder was misled by the claimants.

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

As to (a), we consider that this is a matter for the Court or CAT hearing a particular case. Both have wide powers to deal with costs. For similar reasons outlined above in relation to the loser-pays rule, we do not support the introduction of effectively risk-free litigation (even save in relation to fraud) by the introduction of qualified one-way costs shifting.

As to (b), we do not support this. The damages fund itself should comprise only the compensation sums payable to victims. Claimants who pursue unfounded claims should be at risk of paying the defendants' costs, in the same way that defendants who resist settling good claims should be at risk of paying the claimants' costs.

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

We suggest that the issue as to whether there should be any prohibition or limitation on contingency fees in collective action cases should await the outcome of the current Civil Justice Council review of whether there should be caps on recovery of contingency fees in large cases.

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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

If sums are to be paid to a single specified body, then the Access to Justice Foundation does appear to be an appropriate recipient.

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

If opt-out collective actions are to be introduced (on which we have expressed no comment), we do not support a right to bring them vesting in the Competition Authority. The role and function of the Competition Authority should be kept separate and distinct from the pursuit of private actions for damages, which should be pursued privately (if at all).

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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

Yes. As an organisation we are supportive of ADR, but we do not see any need to make it mandatory. We consider that forcing parties unwilling to engage in ADR, to engage nonetheless, is likely at least frequently to lead to unsuccessful ADR, and accordingly to wasted cost on both sides (or in multiparty litigation, on many sides).

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

Yes. We consider that pre-action protocols serve a useful purpose and should be used in all of the situations proposed. We note, however, that there are circumstances where adverse costs

consequences should not be visited on claimants who do not comply with the proposed protocol (for example claimants avoiding expiry of limitation, or where there is a race (or risk of a race) between parties to seize their preferred Court of jurisdiction – the well-known 'Italian torpedo' situation).

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

Yes. In view of the proposals at Question 1 above, we see benefit in aligning the rules on formal settlement procedures between the CAT and the High Court.

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

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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

As an organisation we represent members whose views on this question differ. We will therefore leave it to individual firms to respond to this question.

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

Yes, but only to a limited extent. In our view, compensation and punishment should remain ideologically distinct. However, we acknowledge that there should be some incentive for companies who have broken competition rules to engage voluntarily in redress schemes, and that small reductions in fines, in limited circumstances, may be appropriate to achieve that incentive.

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

Again, compensation and punishment are and should remain ideologically distinct, albeit that they achieve complementary objectives.

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

We do agree that some leniency documents should be protected from disclosure. Leniency programmes clearly serve an important purpose and companies should be incentivised to seek leniency. We consider that leniency applicants should not be disadvantaged when compared to those who do not cooperate with competition authorities. We therefore support protecting documents that were created solely for the purpose of being granted immunity or a reduction in fines under an EU or

national leniency programme. We suggest that the documents protected from disclosure include Corporate Statements and responses to requests for information where that request was related to information first provided in a leniency statement. It follows that extracts from Corporate Statements should also be protected where they appear in Statements of Objections or in confidential versions of final decisions.

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

We consider whistle-blowers should receive such protection. There are strong reasons to incentivise whistle-blowing. There is an obvious conflict where a whistle-blower is the only person against whom a private claimant can seek redress (most likely because the whistle-blower is the only solvent co-cartelist). In those circumstances, we propose that the whistle-blower's protection be removed only insofar as necessary to compensate the private claimant (and not to provide rights of contribution to co-cartelists).

We see the arguments in favour of protecting other leniency recipients as less strong. By definition, their value in terms of revealing cartels is less. The more co-cartelists who are protected from liability, the fewer who will remain available to meet damages awards. This may lead in some cases to either unsatisfied judgments, or Courts creating exceptions to the protection where necessary to achieve full payment on judgments to claimants. The more such exceptions that are created, the less the benefit to leniency recipients from the protection proposed.

Q.34 The Government seeks your views on whether there are measures, other than protecting leniency documents or removing joint and several liability, where action should be taken to protect the public enforcement regime.

We do not see a need for any such measures. Where necessary reforms are identified, these should be judged on their own merits, but at this stage we see no obvious risks to public enforcement that require immediate action. We consider that the Courts of England and Wales are competent to assess what weight should be accorded to rulings of national competition authorities (or review courts), and do not need to be prevented from taking decisions that are different to them.

Q. 35 Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

London Solicitors Litigation Assocation
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