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Statutory Audit Investigation
Consumer Bill Team
Consumer and Competition Policy
Department for Innovation and Skills
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By e-mail: consumerbill@bis.gsi.gov.uk

17 September 2013

Dear Sirs,

Response to the Draft Consumer Rights Bill (Draft Bill) - The response is submitted with the attached completed pro forma.

The GC100 welcomes the opportunity to respond to the Draft Consumer Rights Bill (Draft Bill) published by BIS on 12 June 2013. The GC100 is the Association of General Counsel and Company Secretaries of the FTSE 100. Please note, as a matter of formality, that the views expressed in this response do not necessarily reflect those of all individual members or their employing companies.

This response focuses on specific issues which are particularly relevant to GC100 members. It has not, therefore, commented on a number of other areas.

Before detailing our specific concerns, we would like to make some general observations.

- The GC100 supports the laudable aim of creating a modern single framework of consumer rights in the UK. The clarification of ambiguous or overly complex laws and modernisation of outdated laws will benefit both businesses and consumers. The GC100 also believes the Draft Bill has broadly achieved a more "plain English" style, which will also benefit businesses and consumers. The GC100 looks forward to working with BIS to ensure that the final Act is fair to both consumers and businesses.

- The GC100 believes that reforms should be targeted and proportionate and should take into account the complex regulatory framework which already applies to certain sectors (such as financial services, telecommunications and utilities). The GC100 is keen to know how BIS envisages the Draft Bill will apply to such sectors and how it will interact with those rules. This is particularly relevant for those parts of the Draft Bill that deal with services and unfair terms. We would welcome the government making clear its position on how Draft Bill dovetails with sector specific rules, the extent to which exemptions will be considered (see further below) and, related to this, the extent to which UK regulatory bodies have been engaged in providing detailed guidance on the overlap between the Draft Bill and the existing rules in their respective sectors.

- The GC100 would like the government to set out a timetable for implementation of the Draft Bill that is realistic, achievable and not overly ambitious. Businesses dealing with consumers are currently facing an overhaul of many rules which apply to their business, both general consumer law and sector specific. The extent and amount of reform places a

considerable regulatory and compliance burden on businesses in a short period of time.

- In the Draft Bill,"consumer" is defined as "an individual acting for purposes that are wholly or mainly outside that individual's trade business or profession", rather than acting for purposes outside his business. We would welcome clarification of the "trade, business or profession" component of the definition (see further below).

Executive summary

Overall content, structure and coverage. Please see our comments above, in particular on sectoral interaction. In addition, we would add the following views on timing and application:

> The GC100 suggests a period of at least 1 year between Royal Assent and application of the new rules.
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> We would welcome the government's view on the extent of the Draft Bill's application to contracts entered into prior to date of application, or to those varied or assigned. We are concerned that, once the new rules are in force, consumers may have an unreasonable expectation of which remedies apply to their contracts, and that businesses may feel under pressure to provide new remedies to consumers with pre-existing contracts in order to ensure a high level of customer service.

No outcome standard. The GC100 is pleased that the Draft Bill does not include any "outcome standard" for certain services performed on a consumer's own goods or property.

Goods. Whilst we welcome the attempt in the Draft Bill to resolve the ambiguity that currently surrounds goods supplied under services contracts, we are concerned that it might have unintended consequences. In relation to the remedies for goods (in a mixed contract of goods and services), clarification would be helpful as how these would apply in the context of home improvement such as the installation of fitted kitchens, bathrooms and bedrooms. For example, the implications of a final right to reject for "goods" which constitute one integral component embedded in a contract that includes a significant services element and other goods. If the consumer exercises his right to reject, he should make all goods available. If one component is rejected that is a small amount of the total cost, is it proportionate to entitle rejection or significant price reduction for the whole contract?

Digital content. We are concerned about the potential liability faced by businesses under the provisions dealing with digital content. While these provisions aim to mirror (to the extent possible) rules applying to goods (such as around fitness for purpose), we think these are not realistic given the nature of digital content and that market. Moreover, we are particularly concerned about the liability faced by businesses for damage caused to a consumer's device or other digital content.

Services. The GC100 consider that the new remedy of repeat performance in the case of non-conforming services is, as currently drafted, problematic. The end result is more likely to be higher prices for services (to take into account the risk) or that the business would rather breach the requirement of reasonable time for repeat performance and move to

the remedy of reduction in price.

Unfair terms. The GC100 believes that the scope of when a term will be assessed for fairness, and the exemption and the component that requires a term to be "prominent", need clarification. As noted above, we also would welcome clarity on what this means in sectors that are specifically regulated (for example, telecommunications, financial services and insurance).

Private actions in competition law.

> ***Role of CAT.*** The GC100 welcomes the significantly enhanced role of the Competition Appeal Tribunal (CAT) in the Draft Bill. However to be successful and implemented effectively, it will be necessary to align the workings of the CAT more closely to those of a Court and ensure that it will have adequate resources.
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> ***Collective actions in competition law.*** The proposal for an opt-out collective action is a controversial one, particularly in light of the recent European Commission recommendation which rejected an opt-out regime in favour of an opt-in collective action regime. The GC100 continues to oppose the introduction of an opt-out system, for many of the same reasons that it was rejected by the European Commission.
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> ***ADR.*** The GC100 welcome the proposed changes to encourage Alternative Dispute Resolution in the private enforcement of competition law.

Enhanced consumer measures: The GC100 is concerned about the new enhanced consumer measures, as these suggest an admission of guilt on the part of an affected business. This may trigger claims by consumers on other matters if they perceive the business to be a "soft touch".

Timing and application

The GC100 believes that there should be a sufficiently long transitional period between Royal Assent and the application of the new rules. We would suggest a period of at least 1 year, given that:

> The Draft Bill is one of many reforms that businesses which deal with consumers will have to comply with. There are general reforms, such as implementation of the Consumer Rights Directive (CRD) and the reforms to CPUT. Moreover, those in regulated sectors must also deal with significant sector specific reforms (such as financial services). The combination creates a particularly challenging environment for businesses.
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> Businesses will need to adjust to the new rules, including training staff and making their existing terms and conditions and business processes conform. This is particularly important because a business faces potential criminal liability under the Consumer Protection from Unfair Trading Regulations 2008 (CPUT) for providing false information or misleading a consumer about his rights (*Regulation 5(4)(k), CPUT*). In light of the government's reform of CPUT to introduce a new direct consumer right of redress for its breach, it is essential that businesses have sufficient time to adjust to the new rules and to achieve the aim of a high level of

consumer protection.

We agree that there will need to be a programme for consumer and business education. We hope the government makes public its proposed plans for such education and training, and particularly the role played by non-sectoral and sectoral authorities in this.

We would welcome certainty about the extent of the application of the Draft Bill on contracts entered into prior the date of its application (pre-existing contract); as there is little in the Draft Bill to indicate how this will work. For a pre-existing contract, which remedies will apply if a fault manifests after that date? What will be the position if a pre-existing contract or works under it is completed after that date? What if pre-existing contracts are varied, or assigned by either party? Without a clear position (and one which is clear to consumers, in order to manage their expectations), we are concerned that a business may feel pressured to provide a consumer with a remedy under the Draft Bill even if a consumer is not entitled to it under a non-affected contract, because the business wants to rightly achieve a consistent high standard of customer service.

Sectoral interaction

The GC100 would welcome express clarification in the Draft Bill of the relationship between it and sector specific regulation. This is most relevant in the case of the rules on services (*Chapter 4, Part I*), unfair terms (*Part 2*) and enhanced consumer measures (*Schedule 6*), which we have noted below.

Of particular concern is the breadth of Chapter 3 which will apply to services in all sectors without exception. The new remedy of repeat performance is not appropriate in certain sectors such as financial services, quite apart from the fact that there is adequate sectoral protection for consumers. Areas such as financial and telecommunications are already highly regulated. We would encourage BIS to implement its suggestion that Chapter 4 Part 1 should not apply to those services we highlight in paragraph 7.5 below.

Rejection of any "outcome standard" for certain services

The GC100 is pleased that the Draft Bill does not introduce an "outcome standard" (that the services be of "satisfactory quality") for certain services to property as discussed in the government's consultation in July 2012. According to the July 2012 consultation, services to property envisage services that relate to goods or property of a consumer, such as installation, repair, cleaning or maintenance, storage or delivery. The standard suggested is that the service would be of satisfactory quality if it meets the standard a reasonable person would regard as satisfactory, taking into account various factors such as description (including any advice by the business about the limitations which can be achieved), price and relevant circumstances.

The GC100 questions whether a general standard for services to be of "satisfactory quality" is appropriate. We agree with the government that any such change would mark a significant shift in the current law, and have a profound effect on businesses providing such services.

In the cases of repair or installation of a consumer's own goods, a statutory outcome standard will expose the business to a much greater liability than the cost of the actual service being performed. The business will effectively be under a duty to advise the

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consumer before the contract is formed, which will require it to spend time and incur costs in assessing the consumer's goods or property. An advisory role on which the consumer relies is more likely to expose the business to liability (including criminal) under CPUT. Insurance costs would increase.

The result is more likely to be higher prices for such services as businesses pass through their own increased costs, or businesses leaving the market altogether (reducing competition in the marketplace). This is particularly a risk for SMEs, who may not be able to absorb additional liability.

We are not clear why an outcome standard would be relevant in cases of storage or delivery or what it would add.

Goods (Chapter 2, Part 1)

The GC100 would like to understand further what the government envisages with clause 14 (installation of goods under a supply of goods contract). We have noted below our reservations with the wide scope of clause 52 (information about the trader or service to be binding), which triggers a breach under this clause 14.

In the case of contracts with both goods and services, we are not clear about the remedies that flow where the services component is significant, and the goods component is an integral but small component. The final right to reject could lead to: (1) a significant 'reworking' of the services which might have been performed satisfactorily merely to extract the rejected good; and/or (2) potentially a significant reduction in the price paid for the services that were properly performed because the good has been rejected.

An example is a bathroom supply and fitting contract. Where one of the goods (such as the sink) proves defective and is repaired or replaced, but it or another unit later proves defective, the final right to reject seems to allow for all the goods to be rejected. In respect of the services element, if the services are performed with reasonable care and skill, would final rejection of the goods entitle the consumer to a full refund of the whole contract, or reduction in the price for services? Is the final right to reject intended to enhance the right for goods by allowing rejection for all goods supplied if only one is defective? To do so and allow a reduction in the price for the services element would be a disproportionate remedy.

We would welcome further guidance on the operation of the remedies for contracts for goods and services, installation of goods, and mixed contracts generally.

Digital content (Chapter 3, Part 1)

In light of the wide definition of digital content the GC100 would welcome clarification on the status of apps provided by businesses for the purposes of online access to the business's website or for use of its primary services (that is, their primary business is not the creation of digital content). For example, many banks provide or sell apps for their customers to access their accounts or for consumers generally to use payment services and retailers provide similar apps for direct online shopping. As currently drafted, such apps seem to fall within scope of these rules, and expose such businesses to additional liability (this is particularly an issue with regard to clause 48). Businesses considering providing apps to enhance their customer offering, or to attract new customers, may be

reluctant to enter the digital content market as a result.

The GC100 notes that many of the new rules applying to digital content reflect those for goods, in particular, around the fitness for purpose standard. This approach is problematic, given the nature of digital content, how it is sold to consumers (distance means) and the different conditions of the marketplace.

We have significant concerns around the introduction of a fitness for purpose standard that would allow the consumer to notify the business of his own purpose (*clause 37*).

> This seems to fail to take into account the speed with which a consumer can place the business on notice. A consumer can email the business, placing the business immediately on notice, and immediately download the digital content.
>
> Moreover a consumer can place the business on notice simply by "implication". With online transactions, there is virtually no interaction between the business and the consumer before the contract is formed. What scenario, therefore, is this reference to implication trying to capture?
>
> The GC100 is particularly concerned that at no point can a business refuse to consent to the consumer's particular purpose. While tangible goods are generally associated with a limited range of alternative purposes, software might be used for various purposes. We note that the definition of "consumer" is where a consumer acts wholly or "mainly" for purposes outside his business, but we are concerned that this would allow the consumer to bring in losses associated with that small element of business purposes.

The GC100 has reservations about the 6 month reverse burden of proof (*clause 44(6)*). Again, this mirrors the reverse burden of proof for goods. But while that period is suitable for tangible goods (or digital content embedded in tangible goods), for intangible goods in a dynamic marketplace, it does not seem appropriate. The digital content creator (not necessarily the trader) may stop issuing patches and fixes because it has developed a new version. The consumer may have updated other digital content, or operating software (or failed to do so), which prevents the affected digital content from operating as expected or as envisaged. Or the problem or fault may lie with the consumer's own device or his ISP. The assumption that for the first 6 months the non-conformity is assumed to be in the digital content seems unrealistic in light of such factors. We have reservations about whether a trader, in these circumstances, would be able to rely on the scope of the exclusion to the 6 month burden of proof which relates to the "nature of the digital content or how it fails to conform" (*clause 44(7)).*

We have concerns about the potential liabilities for businesses under clause 48 (compensation for damage to device or other digital content). Unlike the rest of Chapter 2, clause 48 applies to free digital content as well as paid for (whether directly or indirectly) digital content. Clause 48(2) provides a financial limitation of the cost of replacing the damaged device or other digital content.

> This limitation does not take into account the fact that very large numbers of consumers may be affected. With tangible goods, a fault may be limited to a particular batch of products, allowing the manufacturer to determine (roughly) the potential financial risk where there is a fault in the batch. By contrast, with digital content, a virus or fault, until removed, would affect all downloads of the digital

content, but the number of downloads cannot be quantified in advance by a business.

Clause 48 provides for only one remedy (payment) to the consumer, but it may be that the damage to the device or other digital content could be remedied by fixing (or removing) software or the digital content. We would like BIS to consider providing an intermediate step which would allow the business to attempt to fix the damage. We believe consumers would also benefit from this stage, as their primary concern would be to have a device or other digital content which works.

We think this clause would have the unfortunate side effect of making businesses less likely to innovate and create digital content for consumers, as well discouraging new entrants to the market, given the potential liability they may face. This is particularly the case for creators of free digital content, who may be entering the market for the first time and testing the demand for their product (particularly SMEs). The clause does not take into account the different relationship digital content creators may have with their consumers. Sometimes, digital content (such as games) is released with known defects for users to suggest fixes via beta testing, or even simply to test whether there is a demand for such a product. They may choose not to release early versions, or not to release at all, rather than risk liability under this clause.

Even though the consumer's rights lie against an "app marketplace" trader under the contract, rather than the creator, the app marketplace would seek to recover its loss from the creator. Such marketplace traders are likely to be in a much stronger bargaining position than the creators. Despite the lack of privity between consumer and creator, there is likely to be a significant effect on digital content creators.

Services (Chapter 3, Part 1)

The GC100 is keen to understand how Chapter 3 dovetails with sector specific rules applying to certain services, in particular in regulated sectors such as financial services, telecoms and energy. Only employment contracts are expressly exempt. We note that the government has the power to exclude certain services by way of statutory instrument (*clause 50(4)*). However, the Explanatory Notes only indicate that these exceptions are likely to reflect the current exceptions under the Supply of Goods and Services Act 1982 (services of courts, tribunal and arbitrators, company directors, building societies and management of provident societies) (*paragraph 190, Explanatory Notes*). Given the imposition of new statutory remedies for consumers, we consider that it is worth adding to this list with further express exemptions where sector specific legislation already provides suitable redress.

The GC100 has significant reservations about the scope of clause 52. As currently drafted it is exceptionally wide, as it seems to cover both statements made directly to the relevant consumer, as well as advertising at large that the consumer takes into account. The government has recently published its reforms to CPUT, which give a consumer a direct right of redress in the case of misleading actions. This, combined with these new remedies under the Draft Bill, will very likely lead to the result that a business will simply not engage with the consumer beyond the legal minimum information it is required to give about the services (for example, under the CRD).

The GC100 has noted elsewhere in this response its concerns about sectoral interaction. We note that clause 55(2) states that Chapter 4 is subject to any other "enactment" defining rights or liabilities of a service of any description. We would welcome clarification details on how BIS envisages this would operate with regard to regulated sectors:

> Will this cover guidance, including non-statutory guidance, issued by authorities in such sectors? Will it cover conduct of business rules?
>
> We think that it needs also to be clearer that any other sectoral enactments (and guidance) take precedence over these rules. If a business faces sector specific rules requiring a business to provide a remedy to a consumer, the new remedies in the Draft Bill should not apply.
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> The interaction of these rules and sectoral rules needs to be more explicit in the Draft Bill. This is particularly important to manage the consumer's expectation and understanding of where to seek to redress. While the Draft Bill will receive considerable coverage and consumer education, existing sectoral rules will not, and thus a consumer may think the Draft Bill, and only that, provides him with a remedy.
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> To what extent have regulators in the UK been engaged to develop the analysis of the overlap between the aims and provisions of the Draft Bill versus those in existing sector-specific rules? We would be interested to know if any sort of overlap analysis been commissioned by BIS to clarify the thinking around this critical aspect of the Draft Bill?

The new statutory right to repeat performance is also problematic:

> A consumer cannot require repeat performance if to do so in conformity with the contract would be "impossible". This is an exceptionally high threshold (impossibility in English common law, for example under the law of frustration, is generally very narrow). We think it would be very difficult for an affected business to show that completing performance would be impossible.
>
> The examples given by the government are around decorating or house related matters, where there is perhaps a more tangible outcome or end result for the consumer to assess. But many services are not associated with such a tangible result (such as professional services). While it may well be more likely that repeat performance is therefore "impossible" for those (and the business can move on to the next remedy), the Draft Bill may have increased the consumer's expectation beyond what the law provides and businesses may find themselves in lengthy disputes with consumers over this.
>
> If this remedy is retained, we think that account should be taken of whether the cost of repeat performance (which is borne exclusively by the business) would be disproportionate to the breach.
>
> One possible result of this new remedy might be that a business will simply fail to re-perform within a reasonable time (and risk breach of that requirement), so as to trigger the right to price reduction remedy instead. In addition, businesses more likely to be affected by it may increase their prices to cover the new risk (and the

additional cost to their business, such as insurance costs).

BIS has enquired as to whether certain sectors that are already specifically regulated should not be subject to this requirement. Such sectors include:

Architecture
Development and construction
Telecommunications
Utilities
Financial Services including insurance
Engineering
Transport and storage of goods

Unfair terms (Part 2)

We note that BIS has stated it will work with the OFT, FCA and others to produce guidance for businesses on the tests of transparent and prominent. We welcome this and hope this will focus particularly on the prominence component of the exemption.

We consider however that such guidance should not be statutory. This would add an additional layer to the burden of regulatory compliance, extend the scope of the Unfair Terms Directive (thus placing UK businesses at a disadvantage), and fetter the courts' discretion to apply the unfair terms rules.

Such guidance should also deal with the fact that in some sectors (in particular financial services, telecommunications and energy), there may be practical restrictions on making all aspects of the price prominent due to the volume of such information, as well as prescriptive rules around the presentation (including prominence) of certain information. We question how any one term can be said to be prominent where there is an extensive amount of information to be made prominent. We would also welcome guidance on the appropriateness of using hyperlinks to refer the consumer to other materials where such information can be found.

The GC100 considers that the process of producing such guidance must involve key stakeholders in those sectors, and sufficient time for proper consultation on such sector specific guidance. We consider in particular that until such guidance is finalised and in place, those sections of the Draft Bill should not come into force.

We would also welcome clarification on the difference between test of prominence (*clause 67*) and the test of onerous and unusual (*clause 71*).

Enhanced consumer remedies and other enforcement (Schedule 6)

The GC100 has previously raised its concerns on these proposals (see (*GC100 consultation response on enhanced consumer remedies*). Although Schedule 6 has gone some way to deal with our concerns around proportionality of the proposed new measures, we still have a number of key concerns.

The GC100 has a fundamental concern with these enhanced consumer remedies. Because the imposition of these remedies suggest an admission of wrong doing or guilt, a business will be more likely to challenge these. These remedies are to be attached to enforcement orders or undertakings, but those are often agreed to by businesses on the basis of "no

admission of guilt". In light of some of the other comments below, we think businesses will challenge such remedies by default, leading to protracted disputes with relevant enforcers.

The GC100 is also concerned that imposition of these remedies (and particularly the compensation measures) may encourage a US style "claims culture" in which consumers who learn that a business has offered redress for certain conduct at a certain point of time decide to launch civil claims for historic conduct, or other conduct entirely. There is nothing to prevent this. A waiver from an affected consumer cannot cover conduct other than the conduct that is the subject of the enforcement order or undertaking (*paragraph 8, Schedule 6)*, and non-affected consumers may consider the affected business to be a "soft touch".

The GC100 believes that sectors that are already highly regulated or subject to sectoral licence conditions should be expressly excluded from the scope of these new powers.

We believe Schedule 6 has gone some way to assuage our concerns around the proportionality of the measures that may be imposed. However, we feel it is important that BIS confirm these are objective standards, and not subjective.

We would welcome confirmation as to whether guidance on these remedies would be produced to assist the courts and businesses.

The government's report on the Draft Bill indicates that its aim is that businesses would propose the relevant measures and these would be agreed with the enforcer, and that only if the business is unwilling to propose measures, the enforcer could seek to impose these through the civil courts. However, there is no express provision dealing with the ability of the business to propose the measures (*page 48-49, Government Report*). We think this staged process should be made express in the Draft Bill.

We note that, other than in the case of compensation redress measures (where it is clear what the Draft Bill envisages), there is no exhaustive list of redress measures that may be imposed (as recommended by the GC100 in its consultation response). This creates uncertainty for businesses. While the government suggests that this also provides flexibility to the affected business to propose measures, as noted above, there is no process in Schedule 6 to enable the business to do so.

The GC100 would like express language to deal with the risk of multiple claims and double recovery. As currently drafted, there is nothing in Schedule 6 to prevent a consumer, in cases where he has the right to make a civil claim for damages, from making a claim despite accepting compensation under these new powers. The business would have to seek a waiver from individual consumers as part of a settlement agreement with them, a process that would increase costs on businesses (*paragraph 8, Schedule 6*). The Explanatory Notes indicate that the consumer is free to refuse the offer of redress under these remedies and take their own civil action (*paragraph 314, Explanatory Notes*), but it does not address the situation where the consumer takes the offer of redress, refuses to sign a settlement agreement, and launches his own civil action. While we consider the courts would prevent double recovery in such a scenario under English law, we would prefer if the Draft Bill were clearer on this point (as it is elsewhere as in clauses 18(7), 44(5) and 56(6)) particularly as a business will spend time and money dealing with such a claim. We note that the reforms proposed to CPUT expressly prevent a consumer making a claim via another avenue where he has been granted relief via the new consumer right of

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redress and vice versa (see regulation 27L of the CPUT amending regulations), and consider that a similar provision should be included here.

The GC100 is disappointed that a higher standard of beyond reasonable doubt was not included, given that the imposition of such measures suggests to consumers that the business is "guilty" of wrongdoing.

Private actions in competition law (Schedule 7)

The Competition Appeal Tribunal (CAT). We welcome the increased role of the CAT in the private enforcement of competition law in the Draft Bill which will update Sections 47A, B and C of the Competition Act 1998. Given the proposed enlarged role for the CAT and the increase in the number of cases which it can now hear, we consider that it will be necessary for the CAT to update its rules and procedures to make its functioning more akin to that of a Court. This could include the introduction of a listings office and dedicated registrar. In addition, it will be necessary to ensure that the CAT has adequate resources to deal with its increased workload.

Collective Proceedings.

The proposal to introduce opt-out collective actions is controversial one, and one which the GC 100 believes is not merited. The recent European Commission's recent (June 2013) work in this area notes the major flaws which such a system raises. For example, the European Commission observes in its communication on collective redress (http://ec.europa.eu/justice/civil/files/com_2013_401_en.pdf) that "the 'opt-out' system gives rise to more fundamental questions as to the freedom of potential claimants to decide whether they want to litigate. The right to an effective remedy cannot be interpreted in a way that prevents people from making (informed) decisions on whether they wish to claim damages or not" and that "an 'opt-out' system may not be consistent with the central aim of collective redress, which is to obtain compensation for harm suffered, since such persons are not identified, and so the award will not be distributed to them" (paragraph 3.4). The European Commission has proposed that collective actions be limited to an opt-in regime in EU Member States, rather than opt-out.

We also observe that the European Commission emphasises the need for any exceptions to the opt-in principle to "be duly justified by reasons of sound administration of justice" (paragraph 21 of Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law (2013/396/EU)).

Overall, we submit that given the conceptual flaws of opt-out collective regimes and the European Commission's recommendation against them, the opt-out collective actions proposal is not merited.

If an opt-out collective action regime is nonetheless maintained in the Draft Bill, it is very important that sufficient safeguards are put in place to ensure that the proposed system is not abused and exploited to the detriment of defendant companies (examples of which can be seen in the US in its class action regime). We welcome the safeguards mentioned in the Draft Bill, namely the prohibition on punitive damages and damages-based agreements with lawyers for opt out claims.

However, the Draft Bill is silent on the certification criteria which the CAT will apply to collective proceedings and further clarification is required. As currently drafted, the first criterion for CAT certification is that any consumer body or member of the class can bring a claim if the CAT deems it just and reasonable to do so. This is a wider definition than that adopted in the European Commission's proposals, which state that only a designated or certified organisation that is not operating for private profit but in the wider public interest can bring a collective action. Also, further clarification is required regarding the criteria for claims being eligible for inclusion in a collective action (i.e. where they are considered to raise the same, similar or related issues of fact or law. It is not clear what factors the CAT will take into account in relation to this test and it is a potentially high standard. If the CAT does not publish any guidance on what criteria it will take into account this may result in legal uncertainty, which it may take some years for case law adequately to clarify. Furthermore, if the CAT certification criteria are to be published during the CAT's next review of its rules and procedures, BIS will need to ensure that this is done promptly, and in line with the timings of this Draft Bill. Given the CAT's increased workload to implement this Draft Bill in the future and the possible impact of other open consultations (e.g. streamlining regulatory and competition appeals) we are concerned this may be challenging to achieve, such that more time may be needed before the Draft Bill becomes law.

Unclaimed damages

In addition, we continue to oppose the payment of unclaimed damages to a specified body, as demonstrative of a punishment on a company and not need to provide compensation.

Costs – loser pays principle

In terms of legal certainty, we do not see any reason why the "loser pays" principle has not been expressly provided for in the provisions of the Draft Bill. The principle is an important one in terms of ensuring a fair balance between claimants and defendants and will discourage unmeritorious claims.

SME fast track

The fundamental point remains that justice should be available on equal terms rather than privileging certain parts of the economy. In the explanatory notes to the Draft Bill (paragraph 331), we note that the purpose of the fast track procedure is described as "to enable simpler cases brought by small and medium sized enterprises ("SMEs") … to be resolved more quickly and at a lower cost." We do not believe that one can assume that a competition case involving an SME will be a simpler case and therefore suitable for some type of fast tracking. In any case, the CAT already proactively manages its case-load in the interests of speed and efficiency, thus obviating the need for a specific fast-track.

Alternative Dispute Resolution.

Subject to the comments set out above in relation to the proposed certification process, we welcome the proposals to encourage ADR in private actions under Sections 49 A-E of the Competition Act 1998. In particular, the approval of redress schemes by the CMA gives voluntary redress schemes a firmer legal basis.

Yours faithfully,

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