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Dear Mr Monblat,

Outline/Response to the Department for Business, Innovation & Skills' Consultation on Private Actions in Competition Law: Options for Reform

Introduction

The GC100 welcomes the opportunity to respond to this consultation. As you may be aware, the GC100 is the association for the general counsel and company secretaries of companies in the UK FTSE 100. There are currently over 120 members of the group, representing some 80 companies. Please note, as a matter of formality, that the views expressed in this letter do not necessarily reflect those of each and every individual member of the GC100 or their employing companies.

The Consultation Paper covers a number of issues. The GC100 has concentrated on a number of specific issues which are particularly relevant to its members. It has not, therefore, commented in detail on a number of areas and has not sought to answer all of the questions.

The Competition Appeal Tribunal (CAT)

The GC100 supports the broad sweep of the proposals to give the CAT a more prominent role in competition law enforcement and in hearing private actions. It considers that the CAT has been effective at establishing itself as a specialist tribunal and relatively pragmatic in matters of procedure and approach to hearings.

However, business is interested in the efficient and fair resolution of disputes. It is therefore critical that an enlarged role for the CAT is backed by adequate resources to enable it to fulfil that role effectively.

The GC100 would, therefore, answer yes to Questions 1-3.

SME and fast track

As explained below, the GC100 supports the idea that there may be room for the CAT to adjust its

procedure to assist the prosecution of certain types of claim, where this appears appropriate in all the circumstances, and that the CAT could be encouraged to do so quite actively (making use of its already extensive existing case management powers). However, the GC100 does not support the proposal for specific remedies for SMEs.

First, it does not see why any particular part of the economy should have access to a privileged process. So far as possible, justice should be available on equal terms and it is fundamentally inappropriate to define specific classes of preferred litigants.

Further, it is unclear to the GC100 that SMEs face the problems attributed to them by the Consultation when seeking to bring private actions. SMEs have always had – and continue to have – the right to complain to the competition authorities, which is cheaper than bringing a private action. The competition authorities can also give directions for interim measures to be taken in cases of urgency, which are usually effective immediately. The GC100 understands that many feel that those authorities are slow to take up their cases. However, it seems better to address that issue than to create another route. To the extent that SMEs feel that they have been the victim of anti-competitive behaviour, but the facts are insufficiently clear-cut to allow them cheaply to persuade the competition authorities that there needs to be action, it is wrong that they should be able to impose substantial costs, including public costs, bringing an action on a privileged and protected basis.

Moreover, the GC100 notes that there does not appear to be a single, standard definition of the term "SMEs" in the UK – and that there is a huge range of different types of business that may fall into that group, ranging from micro-businesses at one end to some really quite large and sophisticated businesses at the other end. The GC100 is sceptical whether, in the context of the proposed new rules, the term "SMEs" could be defined in a clear way that limits it to those smaller businesses considered to be at a real disadvantage and which require additional help to bring claims. In any event, the GC100 has not seen evidence that certain categories of business face particular disadvantages under the current system.

To the extent that any particular litigant is disadvantaged, it is open to the CAT to adjust for that through cost capping orders and using the flexibility that it has in its procedures to ensure that a powerful defendant does not exploit that disadvantage so as to impede justice. If it is a matter of injunctive relief, such orders can be made on the merits, with the CAT exercising its discretion as necessary, without the need for prescribed rules to favour SMEs. Similarly, the decision whether to dispense with the usual requirement for a cross-undertaking in damages should be determined on a case-by-case basis, pursuant to the CAT's exercise of the discretion it already has.

The GC100 is also opposed to the idea of a fast track process offered on a default basis (even if not of right) to a given class of claimants (whether SME or others). It has no objection to a fast track process being available in principle. Indeed, in keeping with its wish to see the efficient and low cost resolution of litigation, the GC100 would actively support the CAT in using creative procedures including fast track methodologies in appropriate cases.

However, some competition cases can be extremely complex technically with difficult economic or behavioural evidence. This is not correlated with the size of the claimant. Those cases can have important precedent or other effects, including on the business model of the defendant. It is inappropriate for issues of such importance – which require proper consideration – to be decided on a fast track basis.

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The GC100 appreciates that allocation to a fast track would be a decision for the CAT and not available as of right. However, it is concerned that, in practice, such an arrangement would tend to become a norm or a default. It believes that there would be a far better and more just outcome by encouraging the CAT to exercise greater discretion as suggested under Alternative Options in paragraph 4.34 of the Consultation Paper to reflect the needs of each case.

The GC100 therefore considers that a SME fast track should not be introduced, but that the CAT should continue to maintain its discretion and extensive case management powers to manage claims on a case-by-case basis.

If the government nevertheless considers that it is necessary to introduce a fast track process for a particular class of claimants (however defined), the GC100 proposes that it be reserved for smaller enterprises, as many 'medium-sized' enterprises are quite substantial in size. It should also be subject to a superiority test, as suggested in the class action area, such that the fast track should only be available where the CAT considers that it is clearly superior to deciding the case under normal principles, in the interests of justice, having taken account of what the CAT can achieve through the flexible use of its own procedures. There should also be a *prima facie* assessment of merits before permitting any such SME based application to proceed, to control the risk of abuse. Care should also be taken to ensure that larger companies are not able to use smaller ones to 'front' claims in order to benefit from a fast track route.

There should also be an internal appeal procedure, perhaps to the President of the CAT, of any such decision, given its potential impact on defendants.

Moreover, the right balance should be maintained as regards risks. The GC100 would be very concerned if the discretion proposed in relation to fast track proceedings led to a regular decision to dispense with the requirement of a cross-undertaking in damages or to impose cost caps. The cross-undertaking and 'loser pays' principle are fundamental planks of the English court system to prevent abuse and the bringing of unmeritorious claims. The CAT already has discretion to vary these principles in the cases it deals with; it is unnecessary to change these principles in respect of any category of claimants, SME or otherwise. To the extent any changes are introduced, however, they should be limited to cases in which their application is particularly appropriate.

The GC100's answers to questions 4-6, therefore, are that these issues should be addressed through good and flexible case management techniques by the CAT adapted to the case in hand.

Presumptions on damages

The GC100 is fundamentally opposed to any presumption of damages.

Such an approach undermines the fundamental principle of English law that the claimant bears the burden of proving their loss. It also ignores the fact that disclosure in English litigation (including in actions before the CAT) gives claimants access to relevant documentary evidence held by defendants as to the uplift they might achieve that would assist in calculating loss, and ignores the pragmatic approach the courts have indicated they will take in determining loss (see e.g. *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 (Ch) and [2008] EWCA Civ 1086). There is no justification for departing from this fundamental principle in the context of competition damages actions.

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Moreover, there appears to be no evidence why 20% (or any other figure) would be the correct presumption. The very absence of any evidence demonstrates the arbitrary (and therefore dangerous and unfair) nature of such an approach. The statement that 20% is at the lower end of the range that some economists have estimated can be raised by a cartel, is no basis for such a radical step.

Moreover, it is fundamentally incorrect to say that the current system imposes a presumption that a cartel has caused no loss. There is no presumption that a breach of contract or an act of negligence has caused no loss. Rather the principle has always been that the claimant bears the burden of proving what that loss is. If liability is established, the CAT will likely be sympathetic to the effect that there is some loss, in principle; but that should not relieve the claimant from proving what it is.

The passing on defence is an inherent part of this process. English civil law works on the basis of compensation for loss suffered by the claimant, not punishment of the defendant. The prevailing view arising from cases to date is that, as a matter of law (see e.g. *Devenish* [2008] EWCA Civ 1086 per Longmore LJ at para 147 and the remarks of the Chancellor in *Emerald Supplies Ltd and Anor v British Airways plc* [2009] EWHC 741 (Ch)), the passing on defence is available. It would be wholly wrong in policy terms to undermine the whole basis of English civil law by changing this principle. English law should be allowed to develop in accordance with normal legal principles.

The GC100 would answer no to questions 7 and 8.

Collective Actions

The GC100 is deeply concerned as to the possible consequences of the extension of collective action processes, many of its members having been fully exposed to abuses of similar systems in the US. The ability of the claimant bar to exploit such systems for their own benefit is formidable, and controls to restrict abuse are not going to be fully effective. Moreover, the GC100 questions the conclusions the Consultation Paper draws from the *Replica Football Shirts* case. What was clear from that case was that, even where a good settlement was reached, consumers were not interested in obtaining compensation when the value to them of that compensation was relatively small. The GC100 is troubled by the absence of any evidence that, in other such claims involving widely-spread but relatively low-value losses, there is any genuine consumer need or interest in compensation. Any change allowing damage to society by these infringements to be pursued by representatives or agencies needs to be balanced against the risk of abuse by a profit-seeking claimant bar or representatives/agencies who are financially motivated.

In principle, the GC100 does not see philosophically why, if collective actions were available in follow-on actions, they should not also be available in stand-alone actions. Its issue is with the type of such collective actions.

The GC100 opposes the proposal for an opt-out collective action. This fundamentally distorts the position and is open to systematic abuse, in the context of the litigation funding structures that are available, by the claimant bar. This can easily lead to the CAT's procedures being abused to the unfair detriment of defendants.

Moreover, any collective action, of whatever kind, needs to be controlled by a representative

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claimant, or organisation, that is not operating for private profit but in the wider public interest. A mechanism would therefore need to be in place to scrutinise and rule out plainly profit-driven claims by, for example, the claimant bar, litigation funders or specially created lobby groups. Restricting claimant representatives to a limited collection of bodies (such as those bodies currently able to bring super-complaints) could serve to limit the bringing of profit-driven claims, as could a requirement to disclose the class or representative's funding arrangements. Collective actions should also be subject to strong procedural controls, including enhanced controls on defining the 'class', a superiority test and a *prima facie* test to rule out plainly unmeritorious claims. While the GC100 does not object in principle to litigation funding, a critical consideration is that conduct of the litigation must be driven by those who have suffered loss, and not the financial aspirations of litigation funders or the claimant bar.

Moreover, if a collective action process is implemented, there should be some process to prevent claims being run where the individual loss is very small or impossible to calculate. There is no social utility in compensation based claims being run in such circumstances; those situations are rightly resolved by the agencies imposing fines in the public interest, rather than by the claimant bar making profits when claimants have suffered no material loss.

Equally, opt-out class actions should only be available to businesses in exceptional circumstances. In the usual course, a process equivalent to a group litigation order (GLO) would meet businesses' legitimate concerns and maintain an appropriate balance between all sectors of the economy, without allowing for abuse by the claimant bar. It should be necessary to have particularly strong evidence to justify the need for opt-out class actions for businesses, and to explain why a process equivalent to the GLO structure would not be sufficient to maintain an appropriate balance between the interests of entities at different levels of the distribution channel.

The GC100 would answer yes to questions 11-13. As to question 14, opt-out collective actions should not be permitted.

Consistent with its concerns as to the potential for abuse, the GC100 would answer as follows to the following questions:

15. Effective safeguards should be put in place at the certification stage, including an acceptable 'claimant representative' test with possible disclosure of the funding arrangements, as well as enhanced controls on defining the 'class', a superiority test and a *prima facie* test as noted above.

16. Treble damages should continue to be prohibited; and punitive and exemplary damages should continue to be available only in extreme cases (where the CAT already has discretion to award them: see the recent judgment in *Cardiff Bus* [2012] CAT 19) – they fundamentally undermine the compensatory nature of English civil litigation. Punishment and related policy issues are the responsibility of the competition authorities.

17 and 18. The 'loser pays' rule should be maintained for collective actions. Collective actions diversify and reduce costs risk. The rule is an important part of ensuring a fair balance between litigants and controlling abuse. The CAT has the power to adjust the impact of costs rules in appropriate cases.

19. Contingency fees should clearly be prohibited in collective action cases. Even the Jackson Report shied away from the explosive cocktail of class actions and contingency fees – two of the

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drivers of serious abuse in the USA.

As to questions 20 and 21, the GC100 is fundamentally opposed to the payment of unclaimed damages to any single specified body (or any related cy près doctrine). Consistent with its view that the purpose of civil action is purely compensation, any surplus should be returned to the defendant. It would be demonstrative of the fundamental failure of a collective actions system (and particularly of an opt-out system) that claimants are not seeking to claim damages that they had been awarded: such compensation is precisely the purpose of a collective actions system, punishment being the domain of public enforcement by the competition agencies. Moreover, in circumstances where a penalty has been imposed by the regulator, it is fundamentally unfair that there should be a further, or alternative, penalty imposed by the failure to repay to a company damages that are not needed to provide compensation.

As to questions 22 and 23, the right to bring actions should not be granted to the competition authority. It should be available both to private bodies, but only to suitable not for profit organisations, and to other appropriate public bodies as detailed above.

ADR

The GC100 agrees that ADR in private actions should be encouraged but should not be mandatory. Adoption of a pre-action protocol similar to that applicable to High Court proceedings would address this issue.

The GC100 would, therefore, answer yes to question 24.

Agency Redress

The GC100 is fundamentally opposed to the competition agencies being able to require redress by any route. It fundamentally confuses the public enforcement role of the agency with the private compensation function. The agencies have neither the skills nor the processes to fulfil such a role. There is an inherent risk of the public/policy role being confused with the compensation role: the risk of the agency 'trading' between the two is unacceptable and would undermine confidence in the whole system.

Similarly, the competition agencies should not take account of redress offered by companies when determining the level of fines to impose in the context of their public enforcement role.

The GC100 would answer no to questions 29 and 30.

Protection of whistle-blowers

The GC100 believes that the desire to encourage private actions must be balanced effectively with the need to protect the public enforcement regime, and in particular companies blowing the whistle on cartel behaviour. Immunity and leniency applications are central to the competition agencies' detection and effective investigation of competition law infringements, without which many cartels may never come to light. The GC100 therefore considers it essential that immunity/ leniency applications (i.e. documents prepared for the purposes of seeking immunity or leniency) should be protected from disclosure in private actions. This would strike the right balance between encouraging companies to report cartel behaviour and ensuring the availability of redress

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through private actions in the courts or the CAT.

Other matters

The Consultation Paper seems to be based on the actions of the OFT (or its successor). It is suggested that particular care needs to be taken to ensure that all regulators are treated equally and where concurrent powers are available there is no duplication or inconsistent use of those powers.

The Consultation also omits to address fundamental issues concerning matters such as the limitation periods that would apply to actions brought in the CAT or transferred to the CAT – currently the limitation periods in the CAT and High Court differ significantly, potentially creating significant uncertainty for both claimants and defendants.

Yours faithfully

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