



**Private Actions in Competition  
Law: A Consultation on  
Options for Reform**

**A RESPONSE BY  
THE CHARTERED INSTITUTE  
OF LEGAL EXECUTIVES**

**DATE: July 2012**

1. This response represents the views of The Chartered Institute of Legal Executives (CILEx), an Approved Regulator under the *Legal Services Act 2007 (the 2007 Act)*.
2. CILEx promotes proper standards of conduct and behaviour among members of CILEx. We ensure they are competent and trusted legal practitioners, fully aware of their obligations to clients, colleagues, the courts and the public. We help good practitioners stay good and continuously improve throughout their careers. We ensure the public know the quality of work Chartered Legal Executives can provide.
3. CILEx engages in the process of policy and law reform to ensure adequate regard is given to the interests of the profession and in the public interest. Given the unique role played by Chartered Legal Executives, CILEx considers itself uniquely placed to inform policy and law reform discourse relating to justice issues.
4. As it contributes to policy and law reform, CILEx endeavours to ensure adequate regard is given to human rights and equality considerations and to the need to ensure justice is accessible for those who seek it. Where CILEx identifies a matter of public interest which presents a case for reform it will raise awareness of this within Government and advocate for reform.

### **Executive Summary**

5. The collective action regime as it currently stands as set out in the Competition Act 1998 (The 1998 Act) does not adequately provide redress for consumers and businesses.
6. A generic collective action should be introduced. Individual and discrete collective actions could also properly be introduced in the wider civil context. For example before the Competition Appeal Tribunal (CAT) or the

Employment Tribunal to complement the generic civil collective action. This is consistent with the recommendations by the Civil Justice Council<sup>1</sup>.

7. The right of redress to breaches of competition law should, as a matter of parity, be granted to consumers and businesses.
8. Collective actions should be permitted in stand-alone cases in addition to follow on cases.
9. Given the difficulty of generating sufficient named claimants on a claim form, CILEx would recommend an opt-out regime under the direction of genuine representative bodies.
10. In recommending an opt out scheme, any residue of damages should be distributed to a named organisation. To this end, we are of the opinion that the Access To Justice Foundation is the most appropriate potential recipient of unclaimed sums.

### **The Proposals**

11. The current collective actions regime under the 1998 Act is limited in the sense that the current scheme does not allow the following:
  - Power for representative follow-on actions for damages on behalf of businesses.
  - Nor are there powers for representative bodies to bring stand-alone actions to establish a competition law infringement on behalf of either consumers or businesses.
  - The capacity to bring stand-alone actions for infringement/damages directly before the CAT.

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<sup>1</sup> **Improving Access to Justice through Collective Actions” Developing a More Efficient and Effective Procedure for Collective Actions. Recommendations to the Lord Chancellor CJC 2008**

12. Given the above, access to justice is being undermined to both consumers and businesses. We therefore support the proposals to strengthen the regime by (i) extending the types of cases that can be brought; and (ii) making it easier to bring such cases.
13. CILEx believes a generic collective action should be introduced, as well as individual and discrete collective action regimes in other specialist tribunals, such as the CAT. This is consistent with a recent recommendation by the Civil Justice Council (CJC)<sup>2</sup>. In making these recommendations, we understand that the CJC took into account issues which it identified would be of concern to consumers and businesses, including unmeritorious claims (particularly those brought solely to extract a settlement).
14. In order to bring parity to the regime, CILEx has no objection in allowing collective actions to be brought on behalf of businesses as well as consumers. We also believe that this would raise the deterrence effect of the UK competition system.
15. For the reasons given in the consultation, and the difficulty of generating enough named claimants on a claim form, CILEx would recommend an out-out regime under the direction of genuine representative bodies. This could, for example, be by way of a prescribed list of representative bodies like consumer groups, Liberty etc. or by certification by the tribunal. Of course, even under an opt-out regime, in the majority of cases the class members will 'have to put their feet on the sticky paper' and actively seek to establish individual entitlement to monetary recovery in the event that the common issues are decided in the class's favour, or the action is settled. The potential to bring such an action should not be determined by a finding of infringement by, for example, the Office of Fair Trading, but should be allowed on a stand-alone basis and determined by the merits of a particular case.

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<sup>2</sup> Ibid

16. In recommending an opt out scheme, any residue of damages should be distributed to a named organisation. CILEx has considered the other options, but for the reasons below we would recommend the Access To Justice Council as the most suitable recipient of residue funds from unclaimed damages.

- Avoids the problems associated with trying to find a suitable recipient for each case, and the associated lobbying of judges and potential satellite litigation.
- Even if the court considers a recipient may be suitable for that case, the court cannot be fully sighted on how that decision fits into the national picture and whether it is the most strategic use of those funds.
- The single recipient would receive and use the funds solely in the public interest, acting independently from the parties, their lawyers and the litigation.
- Achieves a full deterrent effect against anti-competitive companies. They have to compensate for the total amount of harm the court decided was caused by their illegal behaviour, regardless of the number of individuals that come forward to collect their damages.
- Provides legal certainty for all parties and the court, before and during litigation.
- Administratively simple, which may save time and cost for the parties and the court.

17. The Access To Justice Foundation supports access to justice across the entire legal system and as the consultation paper rightly mentioned the Foundation is already a charity that receives pro-bono legal costs under s194 of the Legal Services Act 2007. Further, the Jackson Review of Civil Costs also recommended the charity as a beneficiary of unallocated funds after collective actions.