which?

Consultation response

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TO: European Commission
Directorate-General for
Competition, Unit A 5
Damages Action for breach of EC
antitrust rules
B-1049 Brussels

RESPONSE BY: Dr Deborah Prince
Head of Legal Affairs
Which? Ltd
2 Marylebone Rd
London NW1 4DF

Which?'s Key Response

- Which? advocates an opt-out system for competition redress actions brought by national consumer associations or similar bodies on behalf of groups of affected consumers.
- Such an opt-out system is vital - without it, few or no redress actions will be brought by consumer associations.

Which?

Which? is an independent, not-for-profit consumer organisation. We have over one million subscribers to our publications and services. Based in the UK, we are the largest consumer organisation in Europe. At EU level we are members of Beuc, the Bureau Européen des Unions de Consommateurs. Which? is entirely independent of government and industry. We actively campaign on behalf of all consumers and are funded through the sale of our Which? range of consumer magazines and books. Which? has been granted powers to bring enforcement action for breaches of specific UK consumer protection statutes and it is the only body in the UK that is authorised to bring representative actions on behalf of consumers for competition law breaches.

The basis of Which?'s response - *Which?'s experience in practice*

In deciding the system to be implemented for collective redress in competition actions, due consideration must be given to the practical issues that act as a barrier to initiating or joining a collective action. It goes without saying that a system that works on paper but not when it is tested serves no useful purpose.

Our comments in this response shall focus primarily on representative actions brought by qualified entities on behalf of victims. It is here that Which?'s recent experience in the "JJB case"(1) is of considerable value. It provided us with first-hand experience of the practical issues that can act as obstacles or barriers in a system that, on the face of it, is fair and easy to follow.

As a result of our experience in the JJB action we believe that it is essential that follow-on actions <u>brought by consumer associations</u> as a result of competition law breaches should be brought on an <u>opt-out basis</u>. Incorporating this principle into the competition redress system would completely revolutionise compensation claims for victims of competition law abuses and make it far more likely that consumers will get the compensation that they deserve. The basis for our position is as follows.

Reasons for Needing an Opt-out System

<u>1. Low consumer uptake - is there a desire for action?</u>

It is laudable that the aim should be for **all victims** of infringements to have access to an effective redress mechanism **(Para 1.2)**. But it must be understood that, given the small amounts of money that any consumer will generally be entitled to claim as a result of competition law breaches, in practice, there may <u>never</u> be a case where significant number of affected consumers actually sign up. Therefore the aim of ensuring that all victims have access may be rather theoretical: they may have the right to access to justice but if the compensation level is very low, will they use it?

It is our experience that, even outside competition law cases, consumers do not readily participate in legal action. The reasons for this are many and varied and just some of the issues we encountered in the JJB case are listed below.

From the perspective of business, this lack of consumer engagement is used to assert that consumers are not interested in redress. However, the feedback we received as a result of the JJB case was that consumers were very interested in

redress but they were more interested in "seeing something done" and having their voice heard than personally receiving high levels of compensation. With this backdrop, it is easy to see that only the most committed consumers will actively participate in a claim where the aim is for them to benefit personally. But this disguises the fact that there is still an inactive majority that wants action to be taken and is not interested in benefiting individually from that action.

In short, consumers want to know that their collective rights are recognised and they are happy for an independent consumer body to do this on their behalf with the aim being to obtain damages that can be used to compensate active claimants and with any balance being used for charitable good. Consumers see this as far more just than allowing these unlawful/illegal profits to remain in the hands of the infringer. So we see the issue of low consumer uptake as being a product of the system and not a reflection on the desires of most consumers.

2. Why is it necessary to incentivise Consumer Associations to bring redress actions?

Whilst there is consumer appetite for redress for competition law breaches, low consumer engagement - as will nearly always be the case under an opt-in system - does little to encourage consumer bodies to take action on behalf of affected consumers.

Before a consumer body embarks on any redress action, it will want to be confident that it will achieve the maximum impact or, at the least, a significant impact. But, if it is only likely to achieve recovery for a very small percentage of affected consumers, as is the probable situation under an opt-in system, this aim will not be satisfied. In fact, consumer engagement may be so low that the costs of bringing an action may far exceed the overall damages recovered. We have seen this to be the case in a number of opt-in actions in Europe and such experiences justifiably raise concerns about proportionality. But worryingly, such concerns may mean that many valid redress claims will not be initiated.

And we should not forget that consumer bodies do not have unlimited resources - they will all have to direct their resources to campaigns and projects that have maximum importance and maximum impact. So consumer associations are unlikely to allocate time and resource to any redress action that will not have a significant impact. And as opt-in systems are simply not designed to effect such an impact and the common characteristics of a competition redress claim do not

lead to high consumer engagement, we predict that few, if any, opt-in cases will be brought by consumer bodies after an initial "testing of the water".

So we strongly believe that changes are needed to incentivise consumer bodies to bring redress actions.

3. Why opt-out is the best incentive

The primary concerns of consumer associations will be in respect of the levels of impact and proportionality. These could be addressed by providing an incentive either for more claimants to opt-in or for the consumer body to act for all of the identifiable claimants.

Probably the best way to encourage consumers to opt-in would be to inflate the level of compensation paid to them. But this is not an attractive option as it would lead to more issues than benefits and, furthermore, it would not sit comfortably with the traditional European principle of compensation being limited to the level of damage suffered.

That, therefore, leaves incentivising the consumer body as probably the only acceptable way to promote successful redress action. We believe that the simplest, fairest and most effective way to do this would be to introduce a limited opt-out system ie an opt-out system under which a consumer body could act for all affected consumers as a group and, in so doing, re-coup all of the unlawful/illegal gain. This would answer concerns about proportionality, not lead to payment excesses, would simply provide a mechanism for the whole of the unlawful/illegal profit to be extracted and guarantee the consumer body a high level of impact.

4. The JJB case as a "live" example

Which?'s launch of the JJB case had national media coverage in the UK however it attracted less than 1000 claimants out of the millions that were eligible. The lack of claimants coming forwards could be explained for a number of reasons:

- the long period of time between the purchase of the football shirt (purchases were made between 2000/1 and the case began in 2007);
- the lack of evidence of eligibility - few people had retained their receipt or credit card statement for six years or more and many had already disposed of the shirt;

- any compensation was likely to be low as the estimated loss was in the region of £20 (approximately 30 Euros at the time of the case);

- we could not tell people at the outset precisely how much money they would receive. In practice, there is no disclosure of details of individual loss by either the infringer or the National Competition Authority (NCA) so any initial estimate of loss in such cases is pure guesswork; and

- even with significant publicity, people may not have known or realised that they were eligible to claim.

The JJB case took over a year from start to finish and required a considerable amount of internal resource and a team of external legal advisers. It was a success in that it obtained compensation for those claimants that opted-in, but in truth, this represented a tiny proportion of the total potential population. Such an outcome will undoubtedly mean that we will carefully consider whether or not to bring similar actions in the future and, at this point in time, it is hard to see that there are any attractive candidates for an opt-in redress action despite there being several recent UK infringement decisions.

Looking at the current potential cases, it is easy to identify those where there will be little or no participation by consumers due to it being virtually impossible for them to show proof of their claim. For example, in the recent investigation relating to dairy products which was conducted by the UK Office of Fair Trading (OFT), several national supermarket chains and milk producers have admitted to sharing information on the prices of certain dairy products. This activity occurred for many months and related to a period several years ago. The actual financial damage suffered by consumers is unknown but it is not unreasonable to speculate that it will be very low per individual, even though it would have affected many millions of consumers making the overall damage significant.

Given these facts, it would be quite extraordinary for any consumers:

a. to have the goods themselves, and so be able to show their eligibility to claim; or

b. to have proof of purchase sufficient to prove their eligibility to claim - even if consumers had retained their credit card statement, it would not be clear on the face of it that affected dairy products were included in the basket of goods purchased; or

c. to be sufficiently motivated to claim what may be a matter of Euros in compensation in any great numbers.

And even store loyalty cards, which are common among supermarkets, may not be able to provide assistance to identify potential claimants as not all of the supermarkets in question operated a loyalty card scheme and those that did would probably not retain such old purchasing details.

So here is a very good example of there being just cause for action to be taken but no possibility of this happening as too few claimants will opt-in to support an action.

5. How an opt-in system causes imbalances of information and power

The consequences of an opt-in system are much wider than simply affecting the number of claimants participating in an action. Low consumer take-up or uncertainty as to how many consumers will participate in advance of an action being initiated plays into the hands of the infringer. It means that any approaches to effect a settlement prior to an action being brought are likely to be rebuffed - after all why agree to negotiate when you know that if you are difficult an action may not be launched at all?

It also means that, if it comes to litigation, the infringer can call the shots - with a low number of claimants the designated body will always be concerned about proportionality as it may affect its ability to recover costs. It is quite easy to envisage a situation where an offer is tabled by an infringer which is well below what should be paid but the designated body will not have any way of objectively evaluating this offer and can only do so by seeking disclosure through the courts. The infringer will inevitably play on the consumer body's concerns about costs and make it plain that it will resist any attempts to recover costs for litigation after an offer is made - because the offer is a fair one - effectively boxing the consumer body into a corner.

And even if the consumer body is highly likely to recover these costs, the imbalance of knowledge means there is an imbalance of power, which inevitably affects the way settlement or litigation runs to the detriment of the victims. Alternative dispute resolution can lead to settlement but designated bodies need to have strong litigation rights - which they would have if they had the power to act for all consumers as a class - for them to be taken seriously in settlement discussions.

6. *Limitations to be applied to an opt-out system*

Whilst Which? advocates the introduction of an opt-out system, we believe that an opt-out system should not apply to all cases but should be limited in its application to prevent abuse.

We would urge that, where the Commission of the European Communities (CEC) states at para 2.1 of the White Paper, that **qualified entities** in restricted cases should be able to act for **identifiable victims** that this is actioned in such a way that permits and anticipates an opt-out system in **follow-on actions** brought by **qualified entities or designated bodies** but only where:

> loss is at a low level and therefore unlikely to attract a significant proportion of active participants;
> identifying eligible claimants is extremely difficult because the goods or services were purchased many years earlier;
> a large proportion of potential claimants are unlikely to have proof of purchase/eligibility; or
> in such other circumstances that a court may deem reasonable.

We would not advocate an opt-out system for actions brought by a group of victims. Whilst victims should have the ability to join together to bring a redress action, we believe that this should be on an opt-in basis.

7. *Cy-pres distributions as a consequence of opt-out redress actions*

We agree with the CEC's position that any damages secured should first be applied to compensate victims represented in the action and that compensation should reflect the victims' actual loss. However, for the reasons explained earlier, it is unlikely that all claimants - or even a majority of claimants - will register to receive compensation, therefore it should be anticipated that, once all valid claimants have been compensated, any money left over from the damages will be awarded to the consumer body for use in a specific consumer-based project or for a charitable purpose specifically related to the claim.

Without such a "cy-pres" distribution infringers will benefit from their illegal activities so it must be an accepted aspect of an opt-out redess action. It is also the key to incentivising consumer bodies to take action as explained above.

Take the example of Virgin Airways in the fuel-surcharge cartel investigated by the OFT. Being the whistleblower, Virgin Airways has not been fined. It has agreed a settlement that will see registered claimants being paid an agreed sum, however, it remains to be seen how many claimants will actually register in the UK and what type of proof of eligibility will be required from those that do. If, as we would predict, the claimant uptake is far below 100%, Virgin Airways will have profited from its unlawful/illegal activities.

Summary of grounds for proposing an opt-out system

It is for valid practical reasons that Which? recommends that a limited opt-out system is proposed by the CEC which can be used by consumer associations under certain circumstances.

Such a system would serve to:

1. incentivise consumer associations to take action;
2. address the imbalance of power between the claimant/designated body and the infringer; and
3. send a strong message of support to consumers.

Additional comments arising from our experience

- *The CEC should focus on enabling successful follow-on actions to be brought by designated bodies*

Which? feels strongly that consumer-based standalone actions will only be brought in very rare circumstances, and, in fact, it is unlikely that such an action would be initiated at all by a consumer association.

It is far more likely that a consumer body would look to a national enforcement body to carry out an investigation and reach a conclusion on which a follow-on action could be based. Quite apart from the cost and manpower requirements of conducting such a stand-alone investigation, national competition offices have greater and wider powers than consumers or consumer bodies to obtain evidence and search premises. As anticompetitive activity is invariably secret, it is highly unlikely that a designated body would ever be in possession of sufficient evidence

to prove a breach of antitrust law, even at a civil rather than a criminal level of evidence.

And this in turn means that the central role of public authorities in enforcement will always be a feature of antitrust law and private enforcement through damages actions will never be a substitute for public enforcement.

- ***Costs and funding should be wholly recoverable in follow-on actions***

It is essential that either affected consumers or a designated body can be confident that the costs of bringing a representative action can and will be fully recoverable from the infringer. In follow-on actions, absent any unreasonable behaviour on the part of the claimants or the designated body, the court should be required to order the payment of the claimants'/designated body's costs.

In this regard, our experience with the UK model worked well. Also, we suspect that costs management may be more successful where a representative body is acting on behalf of a group of affected consumers as:

> the representative body is likely to have more experience of litigation than consumers and therefore be better able to instruct solicitors and challenge the proposed costs or actions of the external legal advisers; and

> not being a direct beneficiary of the action makes decision making more objective.

We would also point out that, if costs are limited or associated in some way to the value of the claim, designated bodies will be fearful of initiating an opt-in action because of the low probable uptake. It is possible that if only a very small percentage of claimants opt-in, some cases may collapse due to the unlikelihood of recovering the costs needed to run the case properly.

From our practical perspective, it is crucial for costs liability to be as clear and predictable as possible before proceedings are begun.

- ***Damages should not be viewed primarily as a deterrent but as compensation***

Whilst payment of damages to consumers may act as a deterrent to future breaches of competition law, it is far better to separate fines from compensation and be clear that the fine is intended as the deterrent element and compensation is simply

rightful redress. Viewing the two as deterrents runs the risk of leading to a lower fine being levied as the two will be viewed as one.

It is right that infringers are fined and it is right that affected consumers are compensated. The sums paid in respect of each should not be confused.

- ***The principles of follow-on collective redress should fit European Legal Culture and Redress practices but they should also be brave and fit for the purpose of guaranteeing compensation to consumers***

Which? completely agrees that the European Union needs to devise its own system of collective redress. However, we feel equally strongly that this is our opportunity to be innovative and brave. In seeking not to copy other legal systems we should not disregard aspects of those systems if they are effective and sensible.

Rather than be fettered by groundless fears of unintended consequences, we should look at the aims of collective redress and, where necessary, develop new processes and principles. Otherwise we risk not moving forwards on this important issue and only re-packaging the current failing system.

- ***There should be strong public enforcement on which follow-on actions are based***

We wholly support the view that there should be strong public enforcement of competition law. Indeed, as stated earlier, we predict no standalone actions will be brought by consumers in their own right because of the difficulty in proving such cases without special investigative powers.

In addition, as stated above, there are good practical reasons for separating enforcement and compensation and viewing each as having separate functions.

- ***There should be clear criteria for designated body/qualified entity status***

In the UK, criteria to become a designated body empowered to bring a follow-on action include:

> the designated body can be expected to act independently, impartially and with complete integrity;
> it is reputable;
> it is committed to acting in the best interests of those it represents; and
> it has the capability to bring an action on behalf of consumers.

We think that these are sensible and fair criteria to assess suitability for this role and it would mean that this function would most likely be fulfilled by consumer associations or trade associations. We would concur with the CEC's assessment that cases brought by such bodies serve the purpose of rendering rights under competition law more effective and accessible to citizens while moderating the excesses and external costs associated with certain types of "class actions".

Which? agrees that standing should be restricted to certain types of entities. Were this the case, because designated bodies would necessarily be independent and not able to benefit directly from any action, concerns about excesses in approach and external costs that are seen in US-style class actions should be answered. As the CEC states, actions brought through designated representatives are less likely to lead to abuses.

- ***There should be compulsory disclosure of information relating to loss without recourse to the courts***

Much has been said about the need for disclosure to be ordered by the courts so that claimants have sufficient information to assess their loss. However, the primary aim should be to encourage settlement of claims without recourse to court as much as possible.

But settlement is not easy where there is information asymmetry. And whilst it may be possible to issue proceedings, go to court and obtain an order for disclosure to obtain relevant information - the act of having to go through that procedure may stand in the way of settlement. In practice, if you have already had several weeks of preparation and hearings in court to get disclosure, you are far more likely to have a litigation mindset. Also, by that stage, it may not be a great step to have a full hearing.

So we would advocate some form of pre-litigation disclosure by the NCA or the infringer.

Whilst the NCA may not possess a significant amount of material relating to the quantum of individual loss, it will have some, and it will certainly have more than the claimants. We would therefore ask the CEC to propose a system where the investigating NCA is required to disclose such information about quantum as it holds to potential claimants or their designated representative. We would also

recommend that the NCA is empowered to order the infringer to make such disclosure as it can to assist potential claimants or their designated representative calculate the likely individual loss.

We would also add that disclosure of confidential information by an NCA or infringer would be less of an issue where disclosure is to a designated body which is unlikely to use the information for its own purpose and which would be able to give an undertaking to maintain confidence. It should not be necessary to disclose documents to claimants as the designated body simply needs to confirm that it had seen the information and taken it into account when establishing a fair settlement.

- ***Actions should be allowed once all avenues of appeal have been exhausted***

The UK system provides that a follow-on action can be brought at any time during the 2 year period following a final decision. This makes it very clear when an action can be brought and eliminates any uncertainty as to whether or not claims are time-barred. We therefore agree with the proposal that a new limitation period of at least two years should start once the infringement decision becomes final and all appeal avenues are either exhausted or waived.

- ***An approximation of damages should be permitted in place of an exact evaluation in the interests of speed and cost***

The calculation of individual damage is extremely difficult and, since it is affected by so many influences, loss can rarely be calculated empirically. Quantification can be one of the most time consuming and expensive aspects of any claim, and even after a considerable amount of analysis, an exact calculation is frequently not possible. This, coupled with the facts that damages are frequently low and that claimants are often motivated more by a desire for "something to be done" than receiving the exact quantum of damage, militates in favour of an approximation of loss being the best approach.

A very complex system to establish exact loss would act as an obstacle to proceedings as this system would inevitably be long-winded and expensive. It would be far better to have a practical way of estimating loss and we are encouraged by the CEC's investigations in this regard.

- ***Damages should be based on actual loss***

We agree with the CEC's proposal that the damages that victims receive should be compensatory, i.e. compensation should be paid for actual loss plus interest. Quite

apart from being in line with the European tradition of compensation, in our experience from the JJB case, the actual level of damages was less important to claimants than the principle of action being taken. The majority of the comments that we received from claimants who received compensation from JJB were along the lines of "Thanks for getting compensation for me but the main thing was stopping big business walking all over me".

1. The Consumers' Association v. JJB Sports PLC (2007) Competition Appeal Tribunal Case No. 1078/7/9/07