RESPONSE TO THE DEPARTMENT FOR BUSINESS INNOVATION & SKILLS' CONSULTATION ON THE DRAFT CONSUMER RIGHTS BILL

1 INTRODUCTION

1.1 Berwin Leighton Paisner LLP ("**BLP**") welcomes the opportunity to submit comments on the Department for Business Innovation & Skills' consultation on the Draft Consumer Rights Bill (the "**Draft Bill**"). Our comments relate to Schedule 7 of the Draft Bill as BLP has considerable experience in representing claimants and defendants in private competition law actions.

1.2 We welcome several of the proposals made in the Draft Bill including allowing the CAT to hear stand-alone actions and grant injunctions, the concept of a fast track procedure, the introduction of an "opt-out" regime, the approval by the CAT of collective settlements and the approval by the CMA of redress schemes.

1.3 However, our main concern is what the Draft Bill does not say and the fact that much of the detail in relation to the changes proposed in Schedule 7 of the Draft Bill will be set out in the revised CAT rules and in secondary legislation. Our comments relate in particular to the following:

(a) **Expanded role of the CAT**:

(i) ***Injunctions***: It is unclear whether the CAT will have the power to waive the normal condition for the grant of an interim injunction, namely that a suitable cross-undertaking in damages be given by the applicant.

(ii) ***"Hybrid" cases***: One point which requires further clarification is how cases which raise competition law issues, as well as other issues (e.g. contractual issues), will be dealt with.

(b) **Fast-track procedure**: It is unclear how the fast-track procedure will work in practice as the Draft Bill provides that the revised CAT rules may make provision in relation to the fast-track procedure for relevant claims, including the factors relevant to determining whether a claim is suitable to be dealt with under the fast track procedure.

(c) **The "opt-out regime"**: The CAT's certification criteria are not contained in the Draft Bill and are to be set out in revised CAT rules. While the Government has decided that there should be a strong process of judicial certification, including a preliminary merits test, an assessment of the adequacy of the representative and a requirement that a collective action must be the best way of bringing the case, the Draft Bill does not provide further information in relation to any of these points.

(d) **Approval of redress schemes by the CMA**: A key question is what secondary legislation will say about factors the CMA has to take into account when approving a redress scheme. It is very unclear how the CMA could in practice approve a redress scheme without taking into account "the amount or value of compensation offered".

1.4 We would be very pleased to discuss any of the points raised in our response in further detail.

2 THE EXPANDED ROLE OF THE CAT

2.1 We support the proposed changes which would allow the CAT to hear stand-alone actions (in addition to follow-on actions) and grant injunctions. These changes will ensure that the CAT will make better use of its expertise. The CAT has been underused in recent years, even for follow-on actions; this is because claimants have favoured the High Court, in case their claims are not allowed to proceed in the CAT as they may not fall completely within the four corners of the relevant authority's decision. We believe that aligning the limitation periods for claims before the

CAT with those before the High Court will also encourage claimants to bring claims before the CAT.

Interim injunctions

2.2 The Draft Bill provides that the CAT must apply the same principles as the High Court in deciding whether to grant an injunction (including an interim injunction). This raises the question of whether the CAT will have the power to waive the normal condition for the grant of an interim injunction, namely that a suitable cross-undertaking in damages be given by the applicant. We believe that this is an important issue for the Government to consider and have set out below some of the broader considerations which we believe are relevant in relation to this issue.

(a) A balance needs to be found between ensuring that smaller companies are not discouraged from bringing claims and applying for interim injunctions, while at the same time ensuring that defendants are not unduly damaged if it is subsequently determined that the claimant/applicant was not entitled to the interim injunction.

(b) If the CAT appears overly willing to waive the requirement to provide a cross-undertaking in damages in SME cases, this may encourage vexatious claims by SMEs.

(c) Some claimants may be discouraged from bringing a claim before the CAT if the CAT does not have the power to waive the requirement to provide a cross-undertaking in damages.

"Hybrid" cases

2.3 One point which requires further clarification is how cases which raise competition law issues, as well as other issues (e.g. contractual issues), will be dealt with. For example, would part of the case be referred to the High Court to deal with the non-competition law issues? A lack of clarity in relation to this may discourage some claimants from bringing a claim in the CAT.

Resourcing

2.4 The President of the CAT has noted that the CAT is "tiny in budgetary and personnel terms" when compared to the powerful regulatory bodies and huge industry players whose disputes it has to determine. If the CAT is to become, as envisaged by the Government, "a major venue" for private enforcement of the competition rules in the UK, it is important that it is resourced properly in all respects, including the number and size of court rooms, related facilities and a listings office to organise hearings.

3 FAST-TRACK PROCEDURE

3.1 We support the concept of a fast-track procedure for simpler competition cases. The Government has stated that the aim of the fast-track procedure is to empower SMEs and others to challenge anti-competitive behaviour that is restricting their ability to grow.

3.2 The Draft Bill does not set out which cases are suitable for the fast-track. In our experience, "simple" competition cases are relatively rare. The Government has stated that there will be a presumption that any case brought by an SME will be considered for the fast-track. Not all SME claims will necessarily be simple and we do not believe there is a need for such a presumption. We believe it should be left to the discretion of the CAT to determine whether a case is suited to the fast-track procedure. It is also important that the fast-track procedure contains sufficient safeguards so as not to encourage vexatious claims by SMEs.

3.3 While effective and speedy access to justice should be encouraged, it is paramount that the issues raised in fast-track cases are considered by Tribunal members with the appropriate expertise. The Draft Bill provides that cases subject to the fast-track procedure will be heard by a chairman sitting alone. While this may be appropriate for the vast majority of cases, our view is that it would be appropriate to give the CAT discretion to determine the composition of the Tribunal on a case-by-case basis.

3.4 We noted above that the CAT should be properly resourced so that it can become "a major venue" for private enforcement of the competition rules in the UK. It is also important to ensure that the creation of a fast-track does not divert resources away from other (i.e. non-fast-track) cases such that access to justice is delayed for other claimants.

3.5 The Draft Bill provides that the revised CAT rules may make provision in relation to a fast-track procedure for relevant claims, including the factors relevant to determining whether a claim is suitable to be dealt with under the fast track procedure. It is difficult to comment further at this stage as it remains unclear exactly how the fast-track procedure will work in practice.

4 THE OPT-OUT REGIME

4.1 The *Which? v JJB Sports* case demonstrates that the current collective action regime under section 47B of the Competition Act 1998 is not an effective mechanism for bringing collective actions.

4.2 We consider that opt-out collective actions may be more effective than opt-in or pre-damages opt-in collective actions. On the one hand, opt-out collective actions ensure that a greater number of claims are brought collectively. This will bring about greater recompense for the harm suffered and it will assist in increasing the deterrence effect that litigation may have on entities breaching competition law in the future. It also enables defendants to understand sooner the totality of their potential exposure in the jurisdiction in relation to a particular infringement. This may encourage defendants to settle claims earlier. As things stand, there is usually significant delay between the competition law infringement and any payments to those who have suffered harm.

4.3 While we therefore support the introduction of opt-out collective actions, our main concern is what is not contained in the Draft Bill, the main item being the CAT's certification criteria. The criteria are to be set out in revised CAT rules. We note that the Government has decided that there should be a strong process of judicial certification, including a preliminary merits test, an assessment of the adequacy of the representative and a requirement that a collective action must be the best way of bringing the case. Without further information in relation to each of these points, it remains difficult to comment on the proposed opt-out regime. For example, we are unclear what a "preliminary merits test" would involve and what standard the CAT would apply when considering the merits.

5 COLLECTIVE SETTLEMENTS

5.1 We support the Government's decision to enable the CAT to approve collective settlements and thereby allow businesses to quickly and easily settle cases on a voluntary basis.

5.2 The Draft Bill provides that the revised CAT rules may make provision in relation to collective settlements, including the factors which the CAT must take into account in deciding whether to approve a proposed collective settlement. It is important that the revised CAT rules do not restrict or stifle creativity in settlement proposals, such as, for example, defendants offering credits or discounts as part of a settlement proposal.

6 APPROVAL OF REDRESS SCHEMES BY THE CMA

6.1 We support the Government's decision to enable the CMA to certify a voluntary redress scheme when a company has been found by the CMA or the European Commission to have infringed competition law. However, we have concerns about how the CMA would be able to do so in practice.

6.2 A key question is what secondary legislation will say about factors the CMA has to take into account when approving a redress scheme. It is very unclear how the CMA could in practice approve a redress scheme without taking into account "the amount or value of compensation offered". Indeed, in cases relating to a decision by the CMA, it seems odd to think that an assessment of a redress scheme would exclude the possibility of carrying across economic and legal knowledge gained during the CMA investigation when determining if the redress scheme should be sanctioned. We are concerned that the draft of section 49C seems to have no clear qualitative criteria against which schemes should be assessed, which arguably implies a presumption that schemes should almost always be accepted.

6.3 A further practical point is how the redress scheme pathway will interact with the CMA's procedures in a settlement case. Is a redress scheme only likely to be approved for cases where the parties also agree to settle the CMA's investigation? Either way, there are going to be clear timing and resource implications which could affect the overall speed of cases that involve consideration of possible redress schemes. This in turn may make timely settlement of cases more tricky - for example, what happens if the CMA is in discussions with multiple parties to settle the Competition Act investigation, but only a single party to a case wants to enter into a redress scheme and the others do not? If nothing else, it would potentially challenge the CMA's ability to meet a key goal of the current reforms to the competition regime of ensuring faster throughput of behavioural investigations under the Competition Act 1998.

6.4 Another point which requires further clarification is the relationship between redress schemes and collective actions. For example, we assume that claimants who sign up to a CMA-approved redress scheme would be excluded from class actions relating to the same infringement.

Berwin Leighton Paisner LLP
(Ref: ACM/ECSN/MDAT)
12 September 2013