



RESPONSE TO THE OFT'S DISCUSSION PAPER

"PRIVATE ACTIONS IN COMPETITION LAW: EFFECTIVE REDRESS FOR CONSUMERS AND BUSINESS

1. General comments

1.1 Ashurst welcomes the opportunity to comment on the discussion paper issued by the Office of Fair Trading ("**the OFT**"), "Private actions in competition law: effective redress for consumers and business". Before responding to the specific issues raised, a number of general observations are set out below.

- (a) Many of the issues raised are controversial and continue to provoke considerable debate in the overall context of civil litigation, not just in relation to competition law actions (for example, contingency fees and privately funded litigation). We consider it is inappropriate to seek to reach conclusions about these issues of much wider import in relation to the narrow ambit of competition law cases. Such issues must be discussed in a context which reflects their broad impact on civil litigation in the UK.
- (b) The typical competition law claim is a relatively complex claim, in terms of general private litigation. Indeed, we consider that it would be sensible to adopt an assumption that any competition law case will be a relatively complex one. Any standalone competition law case will be complex, even at the level of establishing the basic facts of the infringement and particularly where the alleged infringement requires effects-based analysis. Moreover, any competition law case, whether standalone or follow-on, is potentially complex in terms of causation and quantum. Some of the OFT's proposals do not appear to take into account the fact that "simple" competition law cases are likely to be very much the minority. Moreover, there is no correlation between the size of the claim and the complexity of the case.
- (c) Given the complexity of the majority of competition law claims, it is surprising that the OFT's discussion paper does not propose greater use of the UK's specialist competition forum, the Competition Appeal Tribunal ("**CAT**"). Indeed, given that the CAT is expert in assessing competition law arguments as to liability, the current division of labour between the CAT and the High Court for damages actions might be said to be illogical – the High Court is left to deal with standalone cases where liability is still to be established, very likely requiring complex economic evidence, whereas the CAT is only able to hear follow-on actions, where the issue of liability has already been dealt with by the infringement decision. We note, moreover, that the CAT has extensive case management powers and a very wide discretion on costs, which it has a track record of exercising.
- (d) We consider that the impact of the OFT's case prioritisation criteria cannot be ignored in this context. The prioritisation criteria leave small businesses unsupported when they are not acting as end consumers: to the extent that the OFT's prioritisation criteria do not serve small businesses, there will inevitably be a deficiency in access to justice. Moreover, the OFT's decision to focus its enforcement activity on cartels has two significant outcomes from the perspective of facilitating private enforcement of competition law:

- (i) first, by concentrating on cartels (where the key issue will typically be evidential) the OFT's role becomes more one of policing hard core infringements than being a driver of policy and a developer of the law through decisions in difficult or cutting edge cases. Private enforcement is more difficult in areas where there is no clear precedent to confirm that particular action is established as being an infringement. There is a significant public interest in developing the principles, techniques and methodology of competition law analysis;
 - (ii) secondly, a limitation of cases pursued by reason of administrative priorities necessarily results in a limitation in the availability of follow-on actions, which are themselves an important plank in effective private enforcement.
- (e) In a number of areas discussed in the discussion paper, the OFT seems to be in favour of the option that would hurt the infringer the most, i.e. which would have a strong deterrent effect as well as a compensatory purpose, rather than seeking to identify the option which offer the best overall outcome given the tension between, on the one hand, facilitating private enforcement and, on the other, creating a litigation culture.
- (f) Finally, we take this opportunity to note that section 47A of the Competition Act 1998 ("**CA 1998**"), allowing for follow-on actions, would merit clarification. We refer by way of example to the argument recorded in **Healthcare at Home v Genzyme**¹, where there was extensive debate about the extent to which an OFT/CAT infringement finding bound the CAT in the follow-on action.

2. **Representative actions**

- **Possible action at EU level**

2.1 We doubt it is appropriate to debate the issue of collective actions in isolation in the competition law context. We consider that this is a general issue for civil/private litigation, not merely an issue for competition law. We note also that EU-wide civil procedure reforms are not simple projects, given the widely differing legal systems, both in terms of the litigation rules themselves and the state of development of the system itself, in the various Member States.

- **Possible action at the domestic level**

2.2 We note that within the UK itself the issue of representative actions cannot be viewed in isolation for competition law: the DTI's 2006 consultation on "Representative actions in consumer protection cases" also raises the issue of facilitating collective consumer actions. In the interests of coherence and consistency of civil procedure (and, moreover as regards this specific example, the linkage between consumer protection and competition issues), it would be preferable to take a combined approach to these issues and not to focus on competition law cases in isolation.

- **Representative actions**

2.3 The development of representative actions is raised as a remedy for issues of "access to justice". Our experience is that most businesses are able to deal with any issue of access to justice themselves, by pooling resources and perhaps appointing joint legal representatives. We acknowledge that for smaller businesses, and for consumers with less deep pockets, it may be more difficult. We see no objection in principle to extending

¹ [2006] CAT 29

section 47B of the CA 1998 to allow for representative actions for small and medium-sized enterprises, subject to careful controls (see below).

2.4 We also see no reason why representative action should be limited to the current scope of section 47B – i.e. follow-on actions before the CAT. That said, as noted above, the CAT is a specialist tribunal with extensive case management powers and we consider that the fullest use should be made of this jurisdiction for competition law claims. If standalone actions are to be permitted to be brought as representative actions, the CAT's jurisdiction should be extended accordingly.

- **Representative body status**

2.5 We consider that tight control of the bodies authorised to act as representatives is necessary and appropriate. If businesses are to be able to bring representative actions, then it might be appropriate to allow trade associations to act as representatives. Where a trade association's governance is insufficiently independent of its members, it may not meet point 1 of the current criteria², in which case one solution might be to appoint it to act only as a co-representative, acting jointly with a body that fulfils the criteria in full and could act independently.

- **Effective and flexible case management powers for the court**

2.6 As the OFT notes, the courts (including the CAT, not mentioned by the OFT in this regard) already have extensive case management powers.

- **Identification of claimants: models for representative actions**

2.7 On the one hand, the OFT is careful to draw a distinction between US-style class actions and the representative action provided for in section 47B of the CA 1998, but on the other, it is proposing (and appears to favour) an "opt-out" approach in the UK, which would blur the distinction considerably. We do not consider that opt-out actions are desirable and we would not support the introduction of a collective right of action based on this model.

2.8 We consider that punishment for competition law infringements falls within the remit of the OFT, using its powers to impose penalties, to seek the disqualification of company directors and to bring criminal prosecutions against individuals. The aim of private enforcement rights is to allow a private individual to gain compensation for his loss. Opt-out actions, bringing the largest possible action against the defendant, would operate to shift the role of private enforcement from compensating the victims towards punishing the infringer – indeed the OFT expressly highlights the potential positive effect on business compliance that an opt-out approach would have. However, we consider that this would result in an inappropriate recasting of the balance between the OFT's punishment role and that of the courts.

2.9 We note that the OFT discusses the problem of group litigation brought in the interests of the agent (the lawyers) rather than the principal (the claimants) but draws the distinction

² The current criteria set down in the Secretary of State's guidance "Claims on behalf of consumers – Guidance for prospective specified bodies" (<http://www.dti.gov.uk/files/file11957.pdf>) are as follows:

"1. The body is so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity;

2. The body is able to demonstrate that it represents and/or protects the interests of consumers. This may be the interests of consumers generally or specific groups of consumers;

3. The body has the capability to take forward a claim on behalf of consumers;

4. The fact that a body has a trading arm will not disqualify it from being able to bring consumer group claims, provided that the trading arm does not control the body, and any profits of the trading arm are only used to further the stated objectives of the body."

that in a representative action, the principal (the representative) does not have a pecuniary interest in the outcome of the case. In the US, opt-out actions are a source of considerable revenue for the representatives bringing the action. If representative actions become a lucrative activity in themselves³ then the OFT's desire to avoid creating a litigation culture in the UK will certainly have failed. The OFT does not discuss how representative actions in the UK might be funded. Even if the appointed representative has no financial interest in the outcome of the claim, there presumably will still be lawyers advising the representative and its group of claimants. If UK representative actions were funded through conditional fee arrangements or with private funding, it is not clear that the presence of a representative would avoid the risks associated with advisers having a stake in the outcome of the case. This issue is discussed further below.

- **Individual actions in county courts England and Wales**

2.10 As noted above, we do not believe that there is any correlation between the value of a competition law-based claim and the complexity of the case.

2.11 Given the consensus at the time of enactment of the Enterprise Act 2002 that a specialist tribunal should be created to hear competition law cases, and that all High Court cases should be heard by the Chancery Division in order to build up a body of judges with expertise in this area, it is not clear why it is now proposed to give a third court jurisdiction over such complex cases.

2.12 We consider that the CAT would be perfectly able to handle standalone competition claims and, as a specialist body, would be far better suited to handling small competition law claims than the Chancery District Registries. If there is a view that it is undesirable to have all claims funnelled to London, the CAT could hold its hearings at a location more convenient for the claimant: its jurisdiction extends across the whole of the UK and it has sat outside London in a number of cases to date⁴. Moreover, its modern and flexible procedures mean that location is likely to be less significant than in traditional cases and hearings can be managed in an expedient way.

2.13 An alternative suggestion might be to give jurisdiction to hear smaller competition law claims to the Mercantile Court. This court is present in five major business centres in England and Wales (London, Manchester, Liverpool, Leeds and Cardiff) and the small number of judges involved would make it easier to train them in the relevant law and for them to begin to build up expertise. Moreover, mirroring the arrangements with the Chancery Division judges (who are all on the panel of chairmen for the CAT), the Mercantile judges could be appointed as lay members of the CAT, in order to build up case experience in this area.

3. **Costs and funding arrangements**

3.1 As a general comment, the best mechanism for controlling costs is effective case management by the presiding judge. This is particularly true of competition law cases, where the complexity of the legal arguments and economic analyses can cause costs to rack up if not controlled.

3.2 As the OFT notes, funding and the costs of litigation are issues that operate as disincentives to litigation. By contrast, making funding easily available and reducing the risks of litigation could encourage the development of a culture of speculative claims. We

³ We note the recent arrival of US plaintiff lawyers in the UK market, seeking to make use of their US class action expertise in UK private litigation.

⁴ For example, in **BetterCare Group Limited v Director General of Fair Trading**, hearings took place in Belfast, while in both **Aberdeen Journals** appeals and in **Claymore Dairies and another v Office of Fair Trading**, hearings took place in Edinburgh.

would therefore propose that any changes made in this area should only be introduced with great care and with proper measurement of the likely impact. We think the first step should be to establish the framework for private enforcement of competition law, with changes to costs and fees being reconsidered later and only as part of a broader consideration of access to justice.

3.3 Whilst the OFT's ideas about conditional fee arrangements and private funding are interesting, we do not consider that it is appropriate to consider these issues in the isolated context of competition law cases. The debate about the ethical and practical impact of conditional fee arrangements is on-going and the proper scope of private funding of litigation remains an unresolved issue in the broader debate about access to justice.

3.4 It should not be overlooked that a tribunal that understands well the legal and economic complexities of a case is much more likely to manage it efficiently.

- **Liability of professional funders**

3.5 As regards private funding, the OFT's discussion paper does not make it clear that this is not a well established form of funding: we are not aware of any case which has dealt with the question of whether an action can be brought on the basis of a private loan, other than in insolvency cases. It is not yet clear that such a funding arrangement would not constitute an illegal champerty, and therefore be unenforceable. As noted, we consider this issue to be too controversial to be developed in isolation for competition law cases, but in the context of a broader debate, we consider the following points to be key:

- (a) the particular circumstances in which an action may be funded by private funders must be specified;
- (b) there must be clear rules as to who is able to offer private funds for litigation;
- (c) clear costs recovery rules must be laid down for claims funded by private funders;
- (d) the basis of recoverability of costs awarded against the privately funded party must be clearly established; and
- (e) the relationship between the claimant and the funder must be clear.

- **Conditional fees: percentage increases**

3.6 The OFT's proposal to increase the possible uplift on a conditional fee arrangement above 100 per cent for a successful outcome can only increase the potential for conflicts between the interests of the client and the adviser which is inherent in such structures. Moreover, it risks encouraging speculative claims. As noted above, advising on opt-out class actions on a "no win, no fee" basis has become a lucrative activity in the US.

- **Discretion as to costs and costs-capping orders**

3.7 As regards costs orders generally, there exists a wide discretion for the court to award costs according to the justice of the particular case. We would note in particular that the CAT uses its costs discretion extensively and does not necessarily apply the rule that costs follow the event, particularly where the defendant is the Office of Fair Trading or another publicly funded regulatory body.

3.8 We do not consider that additional guidance on ex ante costs-capping orders is required as the existing general principles are adequate. In our experience, the key issue for effective use of the costs-capping power is that the judge thoroughly understands the case before him. General guidance would be of limited additional value in this respect.

4. **Evidential issues and applicable law**

• **Information asymmetry**

4.1 The OFT presents the view that the English law rules of disclosure should address the problem of information asymmetry between the defendant and the claimant; should allow for the gathering of third party evidence; and can deal adequately with the issue of protecting confidential information. However, we consider that evidential difficulties are a key issue in private enforcement and are one of the primary reasons why most competition claimants elect to lodge a complaint to the competition authorities, rather than bringing a private action in the courts:

- (a) for a private action, it may not be possible even to evaluate the chances of bringing a successful claim until there has been extensive disclosure from the defendant;
- (b) in a private action that is not a follow-on case, the defendant can be expected to fight aggressively on the basic issue of whether its actions are an infringement at all. The very act on which the case is grounded will need to be extensively argued and proven;
- (c) many competition law-based cases give rise to extremely difficult issues of confidentiality. For example, in a margin squeeze case, it is undesirable that the claimant should be given sight of detailed strategic financial data such as the business plan of the defendant (which is its competitor). On the other hand, such data are likely to be central to the case and it will be impossible for the claimant's advisers to take proper instructions unless someone with appropriate knowledge from within the claimant business is able to review the data. Even a simple market share analysis requires knowledge of the individual position of all those in the market, knowledge which competition law prohibits competitors from sharing with each other;
- (d) in cases where a claimant needs to secure an interim injunction prior to prosecuting a claim the information asymmetry problem is particularly acute and the High Court is not an ideal forum for dealing with it. This is due to the well established criteria for securing an injunction. The claimant will need to persuade a judge of its claims in respect of market definition (for example) and that will be more difficult to achieve without the submission of expert evidence in support. This can be extremely difficult in urgent cases. In other words the "serious issue to be tried" threshold for the granting of an interim injunction is particularly hard to overcome in competition law cases. Further, as to the test of whether, in the context of an injunction, damages would be an adequate remedy we recommend a shift away from the traditional focus. The court should be encouraged to look more widely than the particular interests of the claimant and consider the structure of the market as a whole so that an injunction preserves the status quo in the market pending the determination of the claimant's case. In our experience, the CAT has appreciated and applied this balance well.

4.2 We would support the managed implementation of early disclosure obligations on both parties to a competition law claim.

• **Information held by the OFT**

4.3 We agree that where the OFT has relevant information on its file, disclosure to the parties of that information would assist private litigation.

4.4 In relation to follow-on actions, it may well be the case that if the original infringement decision was appealed, the OFT's file will have been disclosed to the potential damages

claimant in the course of that appeal. If there has been no appeal, we consider that the file should still be available to assist in follow-on litigation and that a court order (subject to suitable confidentiality arrangements) to disclose the file should be standard practice in such cases.

4.5 In relation to standalone cases, we see merit in a blended approach to enforcement. The primary difficulty for private parties who wish to prosecute claims is an acute shortage of evidence. Given the extensive information-gathering powers of the OFT, we would propose a framework whereby the OFT used its powers to aid private litigation, as follows:

- (a) Step 1: the potential claimant lodges a complaint to the OFT explaining the basis for the potential claim. It also lodges a claim against the alleged infringer before the High Court (or CAT, if its jurisdiction is extended to standalone cases, which we would support). The claim is stayed by the court.
- (b) Step 2: assuming the OFT is able to form a reasonable suspicion that there has been an infringement, the OFT opens its file and uses its investigatory powers to gather evidence.
- (c) Step 3: if the matter does not satisfy the OFT's administrative priorities, the OFT closes the file. A court order is obtained with the OFT's consent to disclose the OFT's file to the claimant.
- (d) Step 4: the claimant uses the evidence in the OFT's file to ground its claim (and needs only to prove its case on the balance of probabilities, as compared to the "strong and compelling evidence" required for an infringement decision by the OFT).

4.6 We would argue that such a combined private/public approach would make efficient use of OFT resources (in relation to information gathering) in an area where it is very difficult for private parties to match the evidence gathering abilities of the OFT, whilst leaving the concrete analysis and prosecution of the case to the private party.

4.7 As an alternative to this approach, perhaps a similar arrangement could be set up before the CAT. In the context of an appeal under section 46 or 47 of the CA 1998 against an OFT decision, the CAT already has power under paragraph 3(2)(e) of Schedule 8 of the CA 1998 to take any decision which the OFT could have made. If the CAT were to be given jurisdiction to hear standalone private actions based on competition law, and the CA 1998 investigatory powers were extended to cover standalone actions as well (and/or the CAT was empowered to order investigation by the OFT in such cases), then a blended use of public investigation and private enforcement similar to that proposed above might also be possible before the CAT.

- **Status of the decisions of other EU NCAs**

4.8 We do not think it appropriate to make the decisions of an NCA in one Member State binding either throughout the EU or in the courts of another Member State on a reciprocal bi-lateral basis. It is not clear from the OFT's discussion paper that there is a recognised problem in this respect. As regards UK claimants, as the OFT notes, decisions of the UK NCAs and the European Commission are already binding on the addressees of the decisions.

4.9 We note, moreover, that the functioning of the European Competition Network should ensure that cases with a significant multi-jurisdictional element will be allocated to the European Commission in any case.

- **Indirect purchaser and passing on**

4.10 We believe that these issues are shortly to be considered in an action currently before the High Court.

4.11 In any case, we agree with the OFT that it would be unjust to bar claims by indirect purchasers. Such a bar would be inconsistent with the primary competition law policy aim of protecting consumers. Moreover, the compensatory purpose of private claims for damages would not be fulfilled if no loss was suffered by the direct purchaser from the infringer, but downstream purchasers who had suffered loss had no right of action.

4.12 If indirect purchasers are to be given standing, we likewise agree that it is a necessary corollary that the passing on defence should be permitted (except where the claimant is the end consumer). Otherwise private actions could result in parties which had not in fact suffered loss being able to claim compensation, which might in turn contribute to the development of a litigation culture.

4.13 As regards the burden of proof, we agree that it is for the defendant to prove that passing on has occurred. We note that in doing so, the defendant will be dependent on disclosure of financial information by the claimant, which may in turn raise tricky issues of confidentiality.

5. **Effective claims resolution and the interface with public enforcement**

- **Pre-action protocol**

5.1 Use of the pre-action protocols is now considered best practice in civil litigation so we do not consider that it is necessary to take any action to ensure that they are followed in competition law claims. We do not consider that a special protocol is required for competition law claims.

- **Competition Ombudsman**

5.2 We see no need for the creation of a Competition Ombudsman. On the one hand this proposal would appear to be a replacement for the OFT's enforcement work (picking up on complaints passed over by the OFT on the basis of its prioritisation criteria rather than on their merits) whilst on the other hand, the CAT would be perfectly well able to deal with small scale claims if it were given jurisdiction to hear standalone cases. A Competition Ombudsman would simply add another layer of bureaucracy to competition enforcement. Its presence might also encourage tactical complaints.

5.3 The Financial Services Ombudsman works well because the organisations which are affected by its decisions are limited in number and it has built up a detailed specialist knowledge of one market sector. Moreover, it deals with a large number of very similar cases, often with many consumers making similar claims against financial services businesses operating in a very similar way. We do not consider that there is an analogy to be drawn between that body and a possible new institution in the form of a Competition Ombudsman.

- **Consumer and business information**

5.4 We do not consider that the preparation and dissemination of consumer and business information about possible grounds for a competition claim would be a particularly beneficial use of the OFT's resources.

- **Leniency – disclosure**

5.5 We assume that private enforcement in cases where there has been a leniency application will typically be follow-on actions.

5.6 In such follow-on actions:

- (a) the defendant will not be able to deny the findings of fact that it was part of a cartel, as the infringement decision will be binding on the addressees;
- (b) pre-existing evidence about the cartel in the possession of the defendant will have to be included in its disclosure whether such evidence formed part of a leniency application or not. We do not see any basis for protecting such evidence from disclosure – it is subject to disclosure on the basis of a normal application of the disclosure principles;
- (c) if the defendant has copies of a written leniency application in its possession then this will also be subject to disclosure in the normal way. We do not consider that leniency applicants merit any special privileges protecting documents which would normally be subject to disclosure;
- (d) we do not consider it will be a material issue that the claimant is not given access to any leniency statements in the possession of the OFT but which are not in the possession of the defendant.

5.7 In standalone actions, we assume that if a leniency application has been made to the OFT, that case is on-going before the OFT. In that case, presumably the case would be stayed while the OFT's investigation runs its course.

- **Liability for damages and contribution**

5.8 Consistent with the logic that the purpose of private actions is to provide compensation for the injured party, we consider that it would be inappropriate to remove joint and several liability from successful leniency applicants. In the scenario that a number of the cartelists were insolvent or had moved outside the jurisdiction, this could result in an unfair situation where the successful leniency applicant was able to resist some claims and those claimants were then unable to recover their loss as a result.

5.9 We do not consider that the OFT's proposed second option is fair either. If the successful leniency applicant is liable, on the basis of joint and several liability, to the claimants for 100 per cent of the loss, but is then able to claim 100 per cent of the loss back from its co-cartelists, this will mean that leniency has not only resulted in a 100 per cent reduction in the fine, but also (indirectly) in no private liability. The primary prize for a leniency applicant is the immunity from a fine. It is unlikely to be generally acceptable that it might also be able to retain the whole of its financial gain from the illegal cartel activities. It is important to incentivise leniency applicants but it would seem to be tipping the balance too far in their favour to allow them to retain the profits from their illegal – potentially criminal – activity as well.

- **Possible redress in the context of the OFT's administrative settlement of cases**

5.10 The OFT cites the **Independent Schools** case as an example of a satisfactory settlement of an infringement case. Settlement of that case involved setting up a trust fund into which the schools each paid a sum of money and from which pupils who were at the school at the time of the infringement are eligible to make an application for a grant.

- 5.11 The Schools Competition Act Settlement Trust's website⁵ indicates that in the forthcoming year it plans to make 250 bursary awards of up to £1,500, plus 200 project grants of up to £500, plus unspecified hardship grants in circumstances of exceptional financial need. This means that this year, a maximum of around 450 pupils will be able to make a claim against the fund in the coming year. Given that this infringement concerned 50 schools, this averages out at nine grants per school this year.
- 5.12 It is difficult to see that the **Independent Schools** case is an example of a settlement that created an alternative structure for effective redress for those who suffered loss as a result of the infringement.
- 5.13 The OFT's infringement decision in that case expressly made no finding as to whether the information exchange between the various schools actually caused fee levels to be higher than they would otherwise have been. The decision cannot therefore be used as the basis for a follow-on action for damages for any overpayment of fees. Moreover since it was not established that the pupils or their parents were overcharged, it is not clear that it was an appropriate outcome to divert part of the monies that the schools would have paid as a penalty into a trust fund which will distribute it to a small number of the pupils present at the schools at the time of the infringement. On a number of levels, the **Independent Schools** case arose in very specific circumstances and may not provide a useful precedent for other cases.
- 5.14 Leaving that case to one side, we agree in principle with the idea that settlements might be reached with infringing parties that involve the setting up of a scheme for compensation for those adversely affected by the infringing behaviour.

6. Consistency of policy

• Status of OFT decisions and guidance

- 6.1 We note the OFT's proposal to extend the scope of section 60 of the CA 1998 so that courts and tribunals are required to "have regard" to the decisions and guidelines of the OFT (and other UK regulators). Absent evidence that the courts are currently giving insufficient weight to the work and views of the OFT, we do not consider that such a provision is necessary.
- 6.2 Given the OFT's expertise in this area, the judges of the High Court are highly likely to consider the decisions and guidance of the OFT to be persuasive in any case, and the parties are also likely to bring relevant decisions and guidance from the OFT to the court's attention. Indeed, this is already happening (see, for example, **AAH Pharmaceuticals and others v Pfizer and Unichem**⁶).
- 6.3 We note moreover that it would not be appropriate to require the CAT to "have regard" to the guidance and decisions of the OFT given that, first, a key part of the CAT's jurisdiction is to hear appeals on the facts from precisely those decisions and, secondly, in that context it has powers to take any decision that the OFT could have taken.
- 6.4 As an aside, the OFT expresses concern that the policy-making role of the competition authorities could become less effective as private enforcement develops. We agree that this is a risk, but consider that it is a risk which the OFT can seek to minimise by ensuring that difficult, policy-creating cases and/or cases raising novel legal issues will be taken on by the OFT as a priority area. It is probably preferable for a precedent to be set, in a difficult case where the boundaries of the law are being tested, by a competition authority rather than by a first instance judge with no specialist knowledge. If the authority's

⁵ www.scast.org.uk

⁶ [2007] EWHC 565.

decision is then tested by being appealed to the court (and in the UK, this would be the CAT, also a specialist body), the competition authority can play a full part in addressing its views in the appeal process and making sure all relevant policy issues are fully aired.

6.5 In this context, we would note again, as commented above, that we consider that the specialist knowledge of the CAT makes it an obvious forum in which standalone competition cases could be heard, since it will be able to handle the complexity of the competition analysis with expertise and experience, drawing on OFT decisions and guidance as required.

- **OFT as intervener**

6.6 Another way in which the OFT can continue to drive policy and lend its experience and expertise to the development of competition law is by intervening not only in cases where there may be "broader policy issues" of which the court needs to be made aware, but also by letting the court know the OFT's view on the substantive competition arguments before the court where the case is likely to set an important precedent, or has to decide a controversial issue. In such cases, it is appropriate for the OFT to make an intervention on the legal issues at stake in the case, and would be consistent with the role of the OFT as one of the national expert bodies and creators of precedent and policy in this area.

**ASHURST
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