

## BRICK COURT CHAMBERS COMMENTS ON THE OFT'S PAPER ON PRIVATE ACTIONS IN COMPETITION LAW

This response features views from various members of Brick Court Chambers. The OFT's paper has been considered at an internal meeting of interested practitioners and in informal discussions and this document is a combined effort by a number of contributors. However, there are obvious difficulties associated with providing a response from a collection of sole practitioners, each of whom is moreover professionally obligated to advance the best interests of a client on whichever side of a dispute that client may be. Thus it cannot be taken to be in any sense a Chambers view and it is not appropriate to indicate whether any particular comment or suggestion made here has more or less support from members of chambers. Nor does it respond to every point made by the OFT in its paper. Nevertheless, it is hoped that it may assist the OFT in its deliberations.

The issue of private actions in competition law is topical and it is laudable that the OFT wishes to take a lead in the debate both in this country and in the context of the EC review. The Commission is unlikely to wish to legislate in the area if appropriate and harmonious national solutions can be found, and the United Kingdom is widely acknowledged to be a jurisdiction in which to some extent the appropriate solutions are already in place. The OFT is right to concentrate on supplementing what is already to be found in the system.

It is a fact of life that a competition agency such as the OFT (and the EC Commission) cannot efficiently take up and prosecute every case of a competition law infringement that may be brought to its attention.

However, there should be no illusions that private enforcement can be a perfect complement and deal with all the cases of infringement that the agencies cannot process, or choose not to. Indeed, given the very different incentives operating on potential claimants in civil proceedings, it is likely to be a very imperfect complement, especially if the aim of avoiding a US-style litigation culture is to be maintained.

The OFT paper focuses on damages actions and so do these comments. But it should not be overlooked that injunctive relief may be just as or even more important, perhaps especially in Article 82/Chapter II cases, and consideration of whether policy objectives are well served by the substantive and procedural rules relating to such relief would also be worthwhile.

Turning specifically to damages actions, there are considerable risks involved in undertaking competition litigation. It is relatively rare, unusually complex, hard to predict at an early stage of the case and lengthy and intensive to conduct – see the recent US Supreme Court ruling in *Twombly* for recognition of these latter features by a very experienced court. That applies across the board, to large and small claimants alike.

However, as the OFT paper recognises, there is a significant but unquantified level of confidential early settlement of private actions already. These cases are no doubt largely business to business claims (or, in the recently publicised examples concerning the alleged market rigging by generics drug suppliers in the late 1990s, business to government or regional authorities). In the absence of any suggestion that settlements are skewed by anomalous factors, such examples are examples of a system working well: the settlements are commercial and presumptively appropriately priced having regard to litigation risk, and avoid lengthy and expensive trials. Any measures taken or proposed as a result of the OFT's initiatives should be carefully designed to avoid losing these benefits. (It should also not be forgotten that some competition disputes are resolved by way of arbitration which may, from the parties' perspective at least, be as satisfactory as litigation in court.)

As regards SMEs, however, it is probable that there are fewer such settled cases and almost certainly none brought by or in the name of consumers. Anecdotally at least, there may be support for the suggestion that SMEs are inhibited by the cost and difficulty from pursuing competition claims. This is less certain in relation to consumers where it may be that there is little real appetite for pursuing such claims, and thus that it cannot

truly be said that there is a pent-up volume of unmet demand. The relatively low number of purchasers of replica shirts who could be persuaded to sign up for the high profile first representative follow-on action brought by Which? makes this point. Any action to further stimulate demand of this kind carries with it the risk of encouraging a litigation culture of the kind that the OFT paper deplors.

That said, we have no major objection to the suggestions that the scope for representative actions be widened beyond the limited possibilities presently allowed (follow-on actions for individual consumers) to cover stand-alone actions as well, and to actions on behalf of SMEs (although appropriate safeguards would have to be put in place). We believe that in all cases the claimants should be individually identified, consistently with the desire to avoid the fostering of a litigation culture. There is a risk of even dedicated consumer bodies building up a business sideline in damages actions which then requires a regular flow of cases and encourages the drumming up of business. Furthermore, such bodies may also be attracted by the idea set out in the OFT's paper of using the "cy pres" monies for the funding of future litigation in other cases. We are not attracted by this suggestion.

We do not support the suggestion that the OFT should itself seek designation as a representative body in such actions, which risks a confusion of roles in follow-on cases and a diminution of prosecutorial effort on standalone cases. The OFT has the possibility of including remedial action in the terms for disposal of cases where appropriate.

As regards legal representation in damages actions, it seems most unlikely that, without major and almost certainly unpalatable changes to the rules on contingency fees, there will be large numbers of lawyers (and particularly barristers) willing to take the risks inherent in competition damages actions against the possibility of a modest uplift in fees if there is eventually a favourable outcome. Competition litigation is rather different from the field of personal injury which is the major line in which CFAs are to be found – where cases are short, more easily assessable at an early stage and, most relevantly, plentiful, enabling willing lawyers to build up a balanced risk portfolio of cases.

Laudable initiatives such as the Law Society's *pro bono* scheme, pursuant to which Rapture TV brought its recent appeal before the CAT, are unlikely to bridge that gap.

Three points are raised by the OFT which it considers might reduce the hurdles imposed by costs concerns.

First, the OFT asserts that liability of professional funders for costs is likely to decrease the supply of funding for civil litigation. This assertion does not reflect the relevant case law. In the *Arkin* case, the Court of Appeal carefully considered the balance between access to justice and the rights of parties to their costs in the event of success. The OFT's assertion also does not reflect the reality on the ground, where professional funders are still providing assistance in such matters to some extent. However, it is likely that what deters and will continue to deter the large scale provision of professional funding in this area is the inherent riskiness and uncertainty in competition litigation. This has little or nothing to do with a potential exposure to costs but rather a reduced chance of success. They will prefer to direct their funds to areas of law with more easily assessable outcomes such as personal injury.

If the rules were changed so that professional funders lost their potential liability to costs, the consequential effect would most probably be a rash of unmeritorious actions because there would be no risk attached to bringing them. This would be contrary to the fundamental principles of the CPR

The second point concerns percentage increases for conditional fees. At present the permitted uplift is limited to 100%. The OFT suggests that that increase might not be sufficient incentive for lawyers to take on stand-alone damages actions. It may be suggested that empirical assessment should be attempted. However, if such assessment were to demonstrate the proposition, altering the present position would require a change in the law and the increased uplifts would have to be rendered applicable to all claims rather than being restricted to damages claims under competition law (unless it could be demonstrated that such claims were so different from other claims that they needed their

own special regime). In any event, the idea that some of the increase could be funded out of the damages received smacks of a litigation culture which the OFT wishes to avoid.

The third point relates to costs capping. The OFT does not suggest any particular change to the regime, save for a suggestion that the criteria and procedure be codified. In the light, however, of the Court of Appeal's recent decision in *Willis v. Nicholson* [2007] EWCA Civ 199 – 13<sup>th</sup> March 2007 – in which the Court refrained from laying down any general principles re costs capping, saying that the task was for the Civil Procedure Rule Committee - it might be sensible for the OFT to seek to liaise with that Committee rather than proceed down the path of codification.

Thus, although costs and funding as issues undoubtedly play a role in determining which claims are brought, the larger disincentive is probably, as suggested above, the inherent difficulty of competition cases. The examination should perhaps focus more closely on whether there are good policy reasons for alleviating the evidential burdens on claimants.

There is a structural issue peculiar to the United Kingdom system, which is that at present follow-on actions (where the difficult work of identifying and proving the infringement and categorising it under competition law has by definition been performed by the agency) go to the CAT (which is intended to be the expert competition tribunal but has no particular claim to expertise in handling damages actions) whereas standalone actions (where all the “competition” work has to be performed by the parties and the court) go to the normal courts.

That seems anomalous. Since it is now agreed that the next President of the CAT should be a serving High Court judge, one suggestion is that the CAT should be merged or “promoted” into the High Court and a High Court competition list be established, the court in a particular case to be composed of a judge and two panel members drawn from the present CAT. Another is that section 16 of the Enterprise Act should be activated so that the High Court could transfer cases requiring particular competition expertise to the CAT. Neither of these suggestions features in the OFT paper and it may wish to consider

them. However, the suggestion in the OFT paper that smaller cases could be heard by the County Courts seems unrealistic, given the complexity of competition litigation.

If the aim of encouraging and facilitating private actions in particular cases is to free the resources of the public agency for other cases or other types of cases or for policy work, then it should be recognised that the bigger incentives are needed for standalone actions. By definition, follow-on actions do not enable the agency to deal with other infringements – they follow on a finding of infringement after a full procedure has been carried out, including the imposition of any appropriate penalties. There can therefore be no justification for facilitating anything other than proper compensation for those harmed by such infringements. Notably, any suggestion of windfall, whether by application of any rule relating to passing on or through exemplary or punitive damages is entirely misplaced in respect of follow-on actions, whatever the merits of such approaches may be in respect of standalone actions.

Specifically in relation to the passing-on defence, there is no consensus either as a matter of law or as a matter of policy as to whether, and if so in what circumstances, it should be permitted or as to the related issue of whether and if so in what circumstances, indirect purchasers have standing to sue<sup>1</sup>. That said, it is probably fair to state that most practitioners would regard the following policy objectives as desirable, albeit that there may be debates both as to their order of importance and their ability to be reconciled:

- (1) Preventing infringers from benefiting from their infringement i.e. ensuring that infringers disgorge the entirety of their gains and are not unjustly enriched (perhaps especially in standalone cases, i.e. where they are not additionally facing potentially massive agency fines, perhaps in several jurisdictions);
- (2) Ensuring that all those (including indirect purchasers) that ultimately suffer from infringements have standing to sue or are compensated for their loss;

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<sup>1</sup> As a matter of law, one view holds that the act of passing-on is an act of mitigation or an act of loss avoidance that goes to reduce the ultimate loss suffered by the purchaser, and falls to be deducted from any claim for damages. Another view holds that any passing-on by the purchaser is *res inter alios acta*, i.e. an extraneous or independent act that bears no necessary connection to the infringement, and does not fall to be deducted from the claim

- (3) Ensuring that direct purchasers from infringers are not discouraged from bringing proceedings by the complexity and expense of such claims;
- (4) Ensuring that there is no multiple recovery against infringers.
- (5) Ensuring that claimants are not generally over-compensated for more than their actual loss;

Seeking to achieve all of these policy objectives in full is likely to be impossible. The Commission's Green Paper proposed three options:

- (a) Allowing only direct purchasers to sue and denying the passing on defence;
- (b) Allowing both direct and indirect purchasers to sue and allowing the passing on defence;
- (c) Allowing both direct and indirect purchasers to sue and denying the passing on defence.

Broadly speaking option (a) satisfies (1), (3) and (5) of the objectives identified above but not objectives (2) or (4). Option (b) satisfies objectives (2), (4) and (5) but not (1) and (3). Option (c) satisfies objectives (1), (2) and (3) but not (4) or (5).

The OFT has currently proposed a "variant" of option (b), with the variant being that the burden of proof would fall on the defendant to show passing-on and the claimant would also be able to claim damages arising from any lost sales due to the higher prices passed on<sup>2</sup>.

The drawbacks of the OFT's proposed solution are:

- (1) If indirect purchasers do not also bring claims then the infringer will be unjustly enriched (i.e. will be able to retain the overcharge, to the extent of the direct purchaser's passing on).
- (2) Direct purchasers will be deterred from bringing claims by:

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<sup>2</sup> These "variants" would almost certainly have formed part of almost any version of option (b) in the UK in any event. In particular, a claimant is always entitled to claim for loss occasioned by his acts of mitigation or for his "net" avoided loss i.e. if the passing on defence were allowed in English law it would follow inevitably that the claimant could then claim for any lost sales occasioned by that passing on

- (a) the additional complexity and expense of bringing the claim – including the necessity of providing disclosure and economic evidence as to their internal price setting, evidence as to the elasticity of supply in the downstream market and as to their own profits obtained on that downstream market; and
- (b) the prospect of making a lower overall recovery.

This may be seen particularly regrettable if direct purchasers are regarded those that are (in most cases, provided that they are not beholden to their suppliers) most likely to bring a claim (as indirect purchasers are likely to be more disparate and are unaware of the extent to which any overcharge has been passed on to them).

Notwithstanding these drawbacks, the solution suggested by the OFT may be the best one in circumstances where difficult policy trade-offs have to be made. However, it may be worthwhile, before reaching any concluded view on this issue, for the OFT at least to consider an alternative which is outlined below.

The passing on defence is allowed where indirect customers have also brought proceedings and/or where such proceedings are pending or imminent and/or where the Court considers that such proceedings are likely to be brought. However, where indirect purchasers have not brought proceedings and/or such proceedings are not pending or imminent and/or where such proceedings are not likely to be brought then the defence will not be allowed and damages may be obtained on a restitutionary basis i.e. disgorgement of the defendant's profits.

The risk is of course that, once a direct purchaser has brought a claim which has concluded in an award or settlement in the direct purchaser's favour (without passing-on taken into account), indirect purchasers then bring actions against the infringer. This would give rise to the risk of double liability for the infringer. However, it might be possible to deal with this contingency by:

- (a) allowing infringers in such circumstances, in response to the claim by the indirect claimant, to bring third party contribution proceedings against the prior direct

purchaser claimant (which direct purchaser might then counter-claim or plead a set-off for any lost sales arising from the counterclaim).

- (b) It might also be possible to institute a system obliging direct claimants to notify any indirect purchasers (to whom the overcharge has been passed on) of any actions against infringers. If notified indirect purchasers fail to bring a claim within a particular period in response to such notification then they may be barred from claiming thereafter. Conversely, if no such notification is received by indirect claimants then direct claimants may be subject to contribution proceedings brought by the infringer of the type described in the previous paragraph (a).

Whatever solution is adopted, it will be in all parties' interests, where there are potentially both direct and indirect purchaser claims, to ensure that proper procedural mechanisms are in place to ensure that all such claims are consolidated or heard jointly. Otherwise, there remains a real risk both of inconsistent findings and of double liability for defendants.

The OFT's suggestion that courts should have regard to the decisions of UK NCAs (other than final infringement decisions, by which courts are bound) seems sensible and may do no more than formalise existing practice. As regards the binding effect of infringement decisions of other NCAs in the ECN, we consider that the approach should be cautious. It may be expected to be relatively rare that another NCA would take a decision that would establish an infringement producing effects on which a damages action could be founded before the United Kingdom courts. No more binding effect should be ascribed to such decision than it enjoys in its "home" territory and it is essential (consistently with the ruling of the House of Lords in *Inntrepreneur v Crehan*) that no decision should be binding on anyone who did not have a full opportunity to challenge the correctness of that decision in a court.

