Response from the Forum of Private Business (FPB) to

Private actions in competition law: effective redress for consumers and business

28 August 2007

What is the FPB?

The Forum of Private Business (FPB) was formed in 1977 and is a pressure group fighting on behalf of private businesses. The FPB represents approximately 25,000 UK-based businesses, which employ in excess of 600,000 people. The FPB is active in Brussels, and is supported by an all-party group of MEPs.

The FPB provides a range of business services aimed at increasing member efficiency and profitability.

Business opinion

All of the FPB's campaigns are based on the views of our members. We talk to our members in various ways. Via surveys, by telephone and face-to-face contact. We also collect data electronically, which enables us to source opinions from hundreds of businesses within a matter of hours.

The FPB works to bring businesses together with their own elected representatives. Members vote in a quarterly Referendum, adding comments for us to send to their MPs, MEPs, MSPs and AMs. Referendum is a tool that business owners have been using since 1977 to make their voices heard.

The FPB has more than 20 years' worth of experience of accredited research into the small business community. We have been using the Quarterly Survey since 1980 to track business growth, and the rise and fall of key issues, working in partnership with the Small Business Research Trust.

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Introduction and general comments

The FPB welcomes the opportunity to comment on the discussion paper, which has posed comprehensive questions on how best to deal with losses to business and consumers because of anti-competitive practices and cartels.

Our main concern is the ability of small and medium-sized enterprises (SMEs) and of their representative bodies to launch private actions for breaches of competition law, and the impact this would have on the SME community. The following issues need to be settled:

Funding for the Office of Fair Trading (OFT)

There is a potential fine of 10% of annual turnover for each year of an offence. It is important that the OFT should retain its investigation costs and some of the fines to finance further enquiries. The Treasury should not be the sole beneficiary. Such an approach would allow the OFT to take on more cases, and eliminate the need for statements such as the following from the Chairman of the OFT, Mr Philip Collins, that: "…competition authorities cannot, and should not, take on every case. Our work has to be prioritised, limited taxpayers' resources allocated accordingly…"[1]

If an SME or two, or even a few more, go out of business through anti-competitive actions and abuse, that is a very serious matter with high cost implications for the taxpayer – that would include VAT, bad debt relief, lost IR contributions, lost revenue resulting from those made unemployed and the cost of unemployment benefits paid to them etc. The further cost to the wider economy is the loss of output and misallocation of resources resulting from distorted markets. It should rank above budget allocated. The authorities should be looking into the proper funding of the OFT using monies obtained from offending parties.

Associated Octel was fined £75,000 each on two counts and charged costs of £142,655 by the Health & Safety Executive (HSE) in 1996. The NHS produces a 13- to 15-fold return on monies spent in identifying and prosecuting fraud[2] where £300 million savings are achieved through a £20 million budget with 98% success on prosecutions: it is likely that there is a similar return on anti-competitive actions which are themselves forms of theft and fraud. The scale of the problem is well shown on page 6, footnote 6 $2 billion fraud and loss.

Confidentiality

No investigation or prosecution will succeed without evidence. The discussion paper makes suggestions that some of its information may not be released (Section 6). Rights for the defendant must be preserved, but confidentiality must also be given to suppliers giving information to large groups or companies as originally drafted in the Enterprise Bill sections 227–229 pages 160–161, which applies to competition information:

(defined 227 (1)) 227 (2)
"Such information must not be disclosed –
> (a) during the lifetime of the individual, or
> (b) while the undertaking continues in existence
>
> unless the disclosure is permitted under this part.

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[1] Speech to the Law Society's European Group 6 June 2006
[2] http://www.oxfordradcliffe.nhs.uk/news/newsrecords/pre06/Anti-Fraud%20Awareness%20Day%20Chief%20Executive%20of%20the%20NHS%20Counter%20Fraud%20Service%20to%20visit%20the%20John%20Rad.aspx

Further on, the Bill stated that information can only be disclosed with the consent of the company or person.

Incorporation of this would encourage the flow of information that the OFT needs to investigate and deal with competition abuse; it should be noted that information can be given to the Directorate General for Competition in Brussels on a confidential basis for exactly this reason – it is important that individual complainants are not identified if they wish anonymity, though the issues that they raise must be.

The OFT has previously asked for information of this kind (Annex 1), which obviously was intended to encourage whistle-blowers. The OFT should link with Public Concern at Work and be robust in its protection of persons and companies who provide essential information prior to, during and after an investigation[3].

Public authorities

We believe that the consultation document has made a substantial omission in failing to address errant behaviour by Government departments and public sector agencies. We believe that this area has not been duly examined, due to the assumption that Government does not act in a commercial capacity. Such an assumption is incorrect.

In Defra v Rawlings 13 June 2007, Judge Onions said Defra, through its agent the Pesticide Safety Directorate (PSD) had "…wittingly or unwittingly collaborated with chemical companies to maintain a cartel." and called for an enquiry against Defra and a report to the Competition Commission.[4]

The position of a government body is clearly defined by EU Directive 2004/18/EC, whose Article 1, clause 9 states that: 'Contracting authorities' means the state, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law." The issue by such authorities of calls to tender with unique and unusual specifications matched by only one supplier, their use of framework contracts merely to bypass the mandated competitive tendering procedures, and their failure to combat anti-competitive abuse by dominant firms in the tendering process, all need to be examined.

The signing by NHS trusts of contracts which have patient/visitor telephone charges 400% more than some neighbouring trusts and 3000% more than landline charges needs discussion, as these affect consumers.

Specific comments on the discussion paper

1 Introduction

We agree with the assertion that SMEs face practical barriers despite the legal framework being in place

2 Background

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[3] In a proposed defence systems enquiry in the early 90s, persons offered to give information on which Swiss bank accounts were used, who carried the money in, to whom it was paid in UK and elsewhere and the destiny account numbers, providing their employment and pensions were protected i.e. HMG would pay them when they were sacked. That protection was not forthcoming, the information was not given, IR did not recover undeclared tax on payments and individual income etc., but it is encouraging that similar facts in other cases are now emerging.

[4] the evidence accepted in court was that UK farmers had to pay up to 45% more for the same pesticides used by farmers on the continent. Witnesses from the pesticide companies including Syngenta and BASF admitted under cross examination that the major companies deliberately manipulate the market to force the price of pesticides up in the UK.

We strongly agree with paragraph 2.1 that undistorted, efficient and fair competition characterised by equal legal and fiscal playing fields, absence of barriers to entry and exit, and prevention of anti-competitive monopolies and oligopolies, drives productivity and growth, and benefits consumers through low prices.

2.4 The intention to identify and eliminate any barriers for redress for parties injured by anti-competitive behaviour will be amplified later in this discussion.

2.5 Comments will be made on the focus for reform further in the detailed sections

2.9 There are further new examples reported. Goldshield Group plc[5] agreed a £4million settlement with the DoH on a drugs cartel. After that and the resignation of the chief executive and the chief operating officer who were to face criminal charges, Goldshield's shares rose 8%. Coincidentally, the shares in British Aerospace dropped by 8% on news of the American investigation into Al Yamamah and other contracts[6].

2.12 Hurdles to effective private action. We would like to identify another hurdle, namely that SMEs are unable to calculate the likelihood of success of their private action based on past similar cases. There is a need for the principles agreed at private settlement, if not the actual amounts, to be published. What is often overlooked by many is that whilst any reporting of a confidential settlement is at present barred, there is often a later option of seeing it in accounts lodged at Companies House which are therefore in the public domain. A retrospective look at companies known to have settled would be instructive. Otherwise, discovery under the FoI Act would be helpful. It does not help swift resolution of difficulties if neither party knows the game properly.

3 Summary of issues and actions

3.3 It is essential that if actions are brought into county courts, the judges allocated to a competition case should have business expertise, whether this is by court experience or by training. It is well recognised that the judiciary of the Technology and Construction Court sets a standard which must be maintained.

3.4 It has been frequently noted that the costs of legal actions in the UK are higher than elsewhere – this has proven a barrier and a delay. Whilst practical solutions are proposed in 3.7, particularly in the early exchange of information, this does not necessarily mean they are effective. For example, they are of no use against an opponent of bad faith whose record has been to use every legal device and delay. In the EU, some states apply rigid limits on legal costs on disputed issues for example in Germany on a claim of €300K, a limit of €25K for legal expenses for each party might be imposed. This power exists in British courts but is very rarely used (as mentioned in 45.12): steps should be taken to have more widespread use of limitations on costs.

5 Costs and funding arrangements

5.3 Funding

The ways suggested of providing funding are interesting. However, comment needs to be made on after-the-event insurance. Policies of these kinds are generally limited to clear-cut issues, such as personal injury, where there is limited opportunity to dispute the facts. An insurer will not second-guess, but will assess a premium based on a QC's opinion of the case. This is not possible where all the facts are not known before the start of a case, and underwriting sources reveal that competition cases qualifying for a policy would be near 0%. Further, when an FPB member's claim in civil litigation of £100K was very recently put to insurers, the insurance

[5] Daily Telegraph 23/06/2007 "Cartel case drugs firm agrees £4m settlement"

[6] Financial Times 27/06/2007 Front page headline and main news item

premium was quoted as £60K as the costs through the High Court might be as much as £180K. That meant only 40% of the £100K would be paid on winning, and certainly not all the costs: therefore the case did not go ahead as taking it further without insurance might have wiped out the claimant's entire family assets built over a lifetime.

There is sometimes funding for a whole action available from professional funders, but these are generally limited to claims in excess of £250K which would rule out most SME and other private claims. Again the certainty of information needed before proceeding is lacking – much of this only comes from investigation. Private bodies do not have the investigatory powers of the OFT to establish facts and this is the most valuable tool in dealing with cartels and competitive abuse.

The conclusion must be that the OFT should take the lead in most cases, and representative bodies would be an excellent source of information and channels to investigate to support the OFT. This will work if the OFT can retain its operational costs from competition abusers.

5.4 and 5.5 Footnote 30 encapsulates the issue, and professional funders are currently asking for 25% - 80% depending on the risk ratio. However the point to be remembered is that professional funders have no interest in cases below £250K, which means that route is not available for a majority of cases.

5.6–5.9 Conditional fees: percentage increases
The FPB generally approves fee increases of more than 100%: however, the proposal as put in 5.8. and 5.9 does not lead always to a practical solution. A FPB member is in dispute after a judgment in September 2004 awarding him reasonable internal costs: the amount has been disputed by the defendant, and has still to be assessed by a cost judge. It is not acceptable for what should be a swift process to take 3 years and still not be resolved due to the obduracy of a defendant with unlimited funds.

Discretion as to costs and cost-capping

5.10 – 5.16 We would like to see the proposals fleshed out on the legal basis before full comment, but are strongly in favour of the cost-capping (5.12 and 5.13) to be introduced where possible into every case.

6 Evidential issues and applicable law
It is good to see the availability of information in the UK, but there are concerns about the time-frame of securing that information. However, there are concerns on decisions made in EU-wide alignment. Insolvency practitioners report that in some new accession states the judiciary are politically appointed, particularly in the ex-Comintern countries: they often have no business experience and do not understand the facts put before them – wrong decisions are being made. It is suggested that EU and reciprocal alignment be viewed cautiously until all member states have robust systems.

'Passing-on' is very well laid out and we agree with 6.22 and 6.26

7 Effective claims resolution and the interface with public enforcement

7.1We are in complete agreement.

7.2 We support the pre-action protocol and the information to be given by the OFT. However, there are severe reservations on the establishment of a Competition Ombudsman.

Whilst many cases are satisfactorily settled, there is an important core where matters take far too long and are completely unsatisfactory. An FPB member has had a case before the Ombudsman

for three years, and four case officers: his MP (a barrister) has written to the Ombudsman to say that the facts of the case have not been properly examined. Others have taken an equal length of time, with the Ombudsman discounting sworn affidavits.

Our suggestion is that lay members with business experience – and able to read a balance sheet – are recruited to work in the Competition Ombudsman's office if that is established – there will be plenty of legal advice available from the Ombudsman's lawyers. There should also be a set time of six months from start to finish.

Pre-action protocol for competition claims in England and Wales

7.5, 7.6 We look forward to receiving the proposals from the Civil Justice Council

7.7–7.9 We wish to ensure that a Competition Ombudsman, if appointed, should act as described in 7.2. It is felt that a Competition Ombudsman would be helpful: cases should be decided within a short time frame as indecision leads to extended lead time for court actions, some of which have run into limitation by reason of delay.

Consumer and business information

7.10 We support this completely

7.11–7.14 Leniency

7.15–7.16 Disclosure

7.17–7.23 Liability for damages and contribution

7.24–7.26 Possible redress in the context of the OFT's administrative settlement of cases

We are broadly in agreement with the sections 7.11–7.26 above. However, it is the OFT which should be the lead body for remedy, and not private actions.

8 Consistency of Policy

It is welcomed that the OFT is to have copies of all statement of case for private actions under Articles 81 and 82, but the point is well made in 8.5 that: "…with a greater number of private actions and more cases decided by the courts, the need to ensure the consistent application of competition law is likely to become more acute…development of competition law could become more haphazard and less consistent, raising uncertainty of costs for business."

Conclusion

Given the issues raised above, we believe that the time is not yet ripe for any private actions.

After the introduction of the Late Pay of Commercial Debts (Interest) Act in 1998, it took until at least 2004 for substantial court cases to award statutory interest and then the judgment was not published until December 2005, so there had been no precedent to follow. The OFT is in a similar position with competition law.

The OFT should be properly funded to achieve the proper application of competition law. That funding, drawn upon sources such as the penalties paid by errant companies/organisations, will be sufficient to lead the way. The NHS recovery of costs on a 15–1 ratio is a very good example of how this could work in practice.

The OFT has investigatory powers which are not available for private actions, and with the lack of court experience and judgments overall it would be premature for the OFT to take an overseeing of information role, and that of a co-ordinator.

This particularly applies to competition law: it has been well commented on that cartels and other competition abuse are secretive by nature. Whilst there can be prosecutions for the criminal element of competition abuse (e.g. SFO investigation against Goldshield), in general terms this is not available to smaller competition issues.

The reason is that if, for example the Thames Valley Police initiate an enquiry into competition abuse in their territory, and they need to investigate a probable cartel member in Liverpool, Thames Valley will have to pay Liverpool Police Authority for the latter's costs. With the case load for individual fraud officers standing at 50 for City of London Police, and 1,400 for West Midlands, it is plain why fraud prosecutions (very akin to competition investigations) are rarer than they should be. There is a lack of experienced resource to deal with the load, and budget, and not justice, is the serious issue in taking cases forward.

As mentioned, alternative sources of funding for the smaller cases – the majority – do not exist.

The CIOB survey on fraud and corruption in the UK construction industry www.ciob.org.uk/resources/ research reported that 41% of respondents had received a bribe offer on at least one occasion, the perception that corruption in local and national government combined was more likely than in any other single segment, that 17% of companies report a loss of more than £100K per annum, and that 75% did not feel the Government was doing enough to combat corruption. Only 26% of those discovering corruption reported it to the police: possibly knowledge of the lack of resources and the priority the police would give to the investigation was the reason.

It is clear that a number of companies incur costs for tenders that they will not win, which is a competitive abuse for business and is a serious problem.

There is also a ground-breaking decision in the use of police information in civil cases, where an English court allowed release of all police information from Nigeria and England to be used to support the English civil action which gave judgment for the recovery of £4.7million from Governor Dariye of Nigeria. This information greatly aided the 'balance of probabilities' test. Lawyers involved stressed the importance of co-operation between civil and criminal authorities. That effective relationship would not be open to private actions, but would be to the OFT.

For these reasons we believe it is essential that a properly-funded OFT takes on the main burden of investigation and action. There should be one body which can oversee any case from start to finish so it does not to fall down between parties with different funding levels – money spent on investigation will not be useful if there is inadequate follow-through. The OFT needs to set the consistency and standards, and build up expertise in competition law methodology which can at a later stage be passed on to private actions. England and Wales are not ready for that stage yet.

It is instructive to read the Attorney-General's rejected arguments in the Factortame Case in the House of Lords [which referred the decision to the ECJ] (AC 1990 2) on which Lord Bridge of Harwich said:
"I was strongly inclined to the view that, if English law could provide no effective remedy to secure the interim protection of rights claimed by the applicants, it was nevertheless our duty under Community law to devise such a remedy."

The ECJ ruled appropriately (C213/89) on the need to take that action.

We suggest that a properly funded OFT takes the lead role, and should be that remedy.

ANNEX 1

OFFICE OF FAIR TRADING

No: 08/01 15 February 2001

COMPLAIN, COMPLY OR CONFESS

OFT calls on small businesses not to be complacent about cartels.

Small businesses must complain, comply or confess, the OFT urged today as it stepped up its fight against cartels.

The competition authority – which has the power to fine cartel members up to 10% of their UK turnover under the Competition Act 1998 – sees small businesses as particularly vulnerable to the effects of cartels. Some may also be breaking the law, perhaps without knowing it, by agreeing with other businesses not to compete against each other.

The OFT, which has today launched an education campaign targeted at the sector, is calling on firms to:

• complain if they suspect local companies are operating a cartel by shopping them on the dedicated 24-hour OFT Cartel Hotline 020 7211 8888. The OFT will investigate such complaints and offending companies can be fined up to 10% of their UK turnover for up to three years.

• comply with the Competition Act if they want to avoid the heavy penalties that can be imposed for anti-competitive activity

• confess if they are part of a cartel. The OFT's leniency programme provides immunity from fines for the first member of a cartel to come forward.

As part of the OFT campaign, accountants will be sent information about cartels for their clients. There will also be national press and radio advertising to reinforce the importance of this information.

John Vickers, Director General of Fair Trading, said: 'Cartels take money off their customers by rigging markets against them. The OFT will not hesitate to use its powers to unearth, stop and punish cartels. Businesses small and large must know this. And if anyone suspects that a cartel exists, they should blow the whistle by calling our Cartel Hotline.'

NOTE
The Competition Act 1998, which came into force on 1 March 2000, prohibits anti-competitive agreements and behaviour such as price fixing as well as abusive conduct by dominant firms. The Act gives the Director General of Fair Trading the power to impose penalties of up to 10% of a company's UK turnover for up to three years for an infringement of the law.

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The OFT publishes a wide range of leaflets about the Competition Act 1998 which are available free from: OFT, PO Box 366, Hayes UB3 1XB 0870 6060321

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