



**The Office of Fair Trading
Private Actions and Competition Law: Effective Redress for Consumers and
Business**

The Law Society of Scotland's Response

June 2007

INTRODUCTION

The Competition Law Sub-Committee of the Law Society of Scotland (“the Committee”) welcomes the opportunity to comment on the Office of Fair Trading (“OFT”) discussion paper, “Private Actions and Competition Law: Effective Redress for Consumers and Business”, and has the following comments to make:-

GENERAL COMMENTS

The Need for On-Going Public Enforcement

In its introduction the OFT states that the purpose of the paper is to inform the ongoing debate within the UK and elsewhere on the issue of how to make redress for consumers and business for breaches of competition law more effective. The OFT suggests that a more effective system would benefit not only consumers and small and medium-sized businesses in particular, but would also promote a greater compliance culture, and ensure that public enforcement and private actions work together to the best effect for consumers and for the economy.

The Committee supports promotion of access to justice for those affected by breaches of competition law and welcomes the OFT’s consideration of this issue. The Committee agrees that, alongside regulatory and public routes for the enforcement of competition law at national and EU level, there must be adequate and efficient redress for individuals available through the courts where that is the most appropriate course of action and would allow such individuals to obtain compensation for loss suffered due to anti-competitive behaviour. It is also important, as is acknowledged in the discussion paper, that a proper balance be struck between the role of public bodies, such as the OFT as national competition authority - bound to act in the public interest and to promote the uniform application of competition law and policy - and that of a particular entity or person seeking amends for a specific individual wrong.

The OFT has identified a number of obstacles to effective private actions and put forward suggestions for overcoming these hurdles. Further the OFT points to an apparent lack of claims being brought, though, of course, the real number of claims may largely be hidden by out-of-court and confidential settlements or the threat of such claims may be used as a strategic bargaining tool in contractual negotiations. Either way, the OFT has not put forward evidence as to what damage such an apparent lack of private rather than public action causes to individuals or the market in general. It is noted that the cases cited by the OFT, such as the *Hasbro/Argos/Littlewoods* case, are good examples of the proper and effective use of *public* action in combating anti-competitive behaviour rather than instances where private action was required.

Indeed, we note that the OFT has a wide range of powers to investigate and enforce breaches of both EC and UK competition law, backed up by the ability to levy significant fines and, in certain instances, criminal sanctions. The Committee believes that in most cases it be more appropriate for a public solution rather than private action

to be used.

The Committee would therefore have concerns if the aim of increasing private actions were to reduce public enforcement. It considers that if this is the aim then this should be made explicit, but the Committee does not consider private actions are, in any event, a suitable substitute for public enforcement. In many cases claimants do not necessarily want damages, but rather cessation of the offending behaviour. Claimants are unlikely to commit to the often prohibitive cost of litigation to achieve this and a public solution should remain the principal manner in which competition law and policy is enforced.

The Committee also agrees with the statement set out at section 8.2 that the OFT plays a central role in the development and implementation of competition policy in the UK. The OFT must use its enforcement powers to provide transparent and consistent decision-making which takes into account the wider public interest, which is unlikely ever to be the principal aim of private litigation.

By way of conclusion, the Committee's view is that private competition law actions can and do exist alongside, and in harmony with, public enforcement. However, the Committee is not convinced that efforts to encourage greater use of private actions will necessarily and inevitably increase the likelihood that anti-competitive behaviour is detected and addressed. It may be that private actions operate as an additional incentive for business to comply with competition law. However, should regulatory enforcement diminish, it is likely court action (with the uncertainties such action entail) would achieve the same "deterrent" result as robust regulatory action.

The Need for Consistency Across the Judicial System

Although supporting the use of private actions where necessary for the effective cessation of anti-competitive behaviour and where this is more effective than regulatory action, the Committee can identify inherent problems in making adjustments to the operation of the justice system – such as in relation to the capping of costs or speculative fees – for these situations only. The Committee also notes that the OFT does not address in its paper other possible courses of action for promoting further use of private enforcement of competition law, such as education of the consumer and, indeed of legal practitioners and the judiciary.

We would also draw the OFT's attention to Lord Gill's review of civil courts in Scotland, which is likely to touch on many of the issues raised by the OFT in the discussion paper. We would encourage the OFT to play a full role in the review. The Gill review can be accessed via the following website:

<http://www.scotcourts.gov.uk/civilcourtsreview/index.asp>

The OFT should also pay due regard to the differences in Scottish civil procedure from the position in England and Wales. Examples of these differences in procedure include a lack of both cost capping and pre-action protocols in Scotland.

Specific Comments

Representative actions

The principle behind the OFT's proposals is that a greater number of private competition law actions will not only benefit potential claimants, but will also promote a "compliance culture" in the UK. One of the proposals is to allow "representative actions" by bodies representative of consumers and businesses to bring private actions on behalf of those it represents.

The Committee considers that the current powers of the OFT are such that by imposing higher fines and using its various powers more effectively it could encourage a compliance culture. Encouraging representative actions in some circumstances might, in effect, lead to excessive litigation, which would not necessarily entail benefits for consumers, particularly where the sums involved, proportionally, would not be substantial. In those cases, it would seem to the Committee to be in the wider public interest for the wrongdoers to have sanctions imposed on them by the OFT where the overall economic effect of a competition breach is far (disproportionately) greater than the actual damage suffered by a particular consumer.

The Committee would cite the *Hasbro/Argos/Littlewoods* case where a cartel was brought to an end by the OFT as an example of a case where, although the amounts seem substantial, the amount involved for the individual consumer appears to have been minimal.

Damages

The OFT suggests that consumers and businesses suffering losses as a result of breaches of competition law should be able to recover compensation both as claims for damages on a stand-alone basis and in follow-on cases brought after public enforcement action.

The Committee's view is that the function of civil claims is to quantify and compensate those who can show causation and loss. Appropriate redress for loss in those circumstances should be available through the court system. While the Committee has no objection in principle to, for example, follow-on damages actions, it remains important that private actions in respect of anti-competitive behaviour should not be treated differently to any other civil claim by the introduction of further incentives to private enforcement.

Costs and funding arrangements

The OFT sets out that one of the major obstacles to bringing private actions in competition law is the cost of such actions and the difficulties and risks in funding them. The Committee agrees that this can be a disincentive to any civil action but would, however, also agree with the OFT's statement at section 5.10 that the usual rule whereby costs (in England and Wales) or expenses (in Scotland) follow success is generally fair and efficient. The Committee's view is that the current position on costs or expenses appears to be fairly self-regulating. It considers that the threat of losing an action (and the likely costs or expenses this will entail for the losing party) can be a positive advantage in the settlement of an action at an appropriate stage.

The Committee is therefore concerned that costs-capping as suggested at section 5.11 may not be in the wider public interest.

By capping costs at an early stage there may be a risk of a rush to settlement before the merits of the case had been fully explored and that an important issue in respect of the case might be missed. In addition, the Committee would reiterate its point that it is unclear why there should be costs-capping for this area of law and not for other areas of civil litigation.

The OFT suggests an alternative to the current conditional fee system at section 5.7 which would be to allow a percentage increase of more than 100 per cent. This would be a change to the current position in Scotland where the courts do not generally get involved in how actions before them are financed.

Again, the Committee doubts that it would be equitable or in the public interest to make changes to the current fee system in respect of competition cases only. As a matter of public policy it would seem inconsistent to have one rule for competition cases and not for other cases and we consider that the issue should be considered in the context of a wider review of civil procedure (such as the Gill review).

Creation of a litigation culture

It would be a concern if a litigation culture were allowed to arise. This might happen if private actions were seen as a substitute for public enforcement, particularly where this became the only effective form of redress.

Exclusion of passing on

The Committee would not be in favour of any exclusion of passing on. As noted above, the function of civil claims is to quantify and compensate those who can show causation and loss. Further, to allow the introduction of the passing-on defence could cause confusion. There should be consistency within Europe as to the position regarding passing on so that there is a level playing field and the Committee considers that a lack of uniformity,

unequal treatment and distortion of the law in this area could cause great difficulties and would not be in the public interest. The Committee consider that a European-led initiative in this area is desirable, but the default position should be the non-availability of the passing-on defence.

Mediation

The OFT states at section 7.1 that in many cases, early resolution of competition claims by means of a settlement made between the parties, whether or not facilitated by a third party, will be a more desirable outcome, both for businesses and for consumers, than taking a case to court and proof.

The OFT suggests that to facilitate effective claims resolution in competition cases there could be the introduction of a pre-action protocol for competition claims in England and Wales; establishment of a Competition Ombudsman; and publication by the OFT of information for business and consumers on private actions, including settlement options.

As no pre-action protocols have been introduced in Scotland to date the Committee does not intend to comment on this proposal, though we would note that such protocols could be developed.

The OFT suggests at section 7.7 that consideration could be given to the establishment of a Competition Ombudsman, based on the Financial Services Ombudsman model. The Committee is also not convinced that the establishment of an Ombudsman would add anything (other than expense) to the current enforcement system. It also considers that it may be too indirect for consumer issues.

However, the Committee acknowledges the value of mediation in certain cases, and that in many situations - and, in particular, certain Article 82 cases - it can provide an appropriate solution for the parties to the dispute. However, that is not to say that the solution reached would be the best from the competition policy perspective, and, insofar as the parties involved are businesses, the solution may not be in the public interest. Accordingly, while mediation may have a role to play, it should not be viewed as a replacement to public enforcement.

There may be greater scope for mediation, however, in follow-on damages actions, where there will have been a decision of the OFT or Commission establishing a breach of competition law. Accordingly, there will be less danger of any agreed solution not complying with competition policy.

Damage to the leniency programme

The Committee commends the excellent leniency programme that has been put in place for businesses, which come forward with information about a cartel in which they are involved (not only in respect of horizontal cartels but also in respect of vertical price-fixing). The leniency programme appears to work extremely well. The

Committee is concerned that, as noted by the OFT at section 7.12, the risks of private actions with the risk of greater civil liability/court time/lawyers' costs etc could discourage undertakings from applying for leniency meaning that a smaller proportion of cartels would be uncovered. It would also be concerned if those who cooperate with the OFT by coming forward with information on a cartel they have been involved with are put in a worse position in a private action than those who do not with the impact this will have on the incentive to cooperate in a programme which has been shown to be effective, efficient and quick. The concern is that the possibility that the OFT would not keep confidence might be a deterrent to full and frank disclosure which is what makes a leniency programme worthwhile from both the penitent wrongdoer and public policy perspectives.

The Committee welcomes the OFT's comments in section 7.13 that it proposes to safeguard the programme, and applauds the OFT's practice and stance on discoloured as outlined in its response to the European Commission's Green Paper (May 2006). Further, the Committee's view is that removal of joint and several liability for the immunity recipient would be helpful in encouraging compliance as there would be less exposure for that person.

Settlement as part of the Administrative Procedure

The OFT is also exploring whether, as part of its administrative procedure, it might be appropriate for it to encourage undertakings against whom it proposes to take enforcement action to provide redress to those who have suffered loss due to infringements and refers to the *Independent Schools* case at section 7.25.

The Committee's view is that the *Independent Schools* case is a good example as to how the OFT is in the best position to provide solutions in the public interest to infringements of competition law.



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