



OFFICE OF FAIR TRADING DISCUSSION PAPER

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

LAWRENCE GRAHAM LLP RESPONSE

19 JUNE 2007

Thank you for advising us of the publication of the OFT's discussion paper and for your invitation to provide views on how to make private actions in the UK more effective.

Lawrence Graham LLP ("LG") supports the OFT's approach set out in its discussion paper and the vast majority of the recommendations set out in that paper.

LG would make the following additional points:

Background

- Paragraph 2.11 – the OFT states that the type of damages that may be recoverable will be for the courts to determine. LG suggests that it may be valuable for the OFT to give further thought to this matter. The types of damages that could be available go to the heart of the nature of private actions. If damages are purely to be compensatory in nature, the focus of private actions will be on the loss to claimants. If, however, restitutionary damages or an account of profits may be available, then the focus may shift towards penalising the entities implicated in anti-competitive behaviour.

Representative Actions

- Paragraph 4.5 – the possibility of a Community instrument to require all Member States to ensure that there is an effective collective means to bring claims for breaches of competition law raises the question of the status of a cross border collective claim. It would be necessary to consider the status of such claims. For example, would such a Community instrument require Member States to recognise the status of a specified representative body from another Member State, even if such a body did not fulfil the criteria for being specified as a representative body in the Member State in which the claim was being brought?

Paragraph 4.7 – the OFT states that standalone claims are an additional and more immediate corrective mechanism than follow on claims, since they can be brought before the conclusion of a competition authority investigation or any absence of any such investigation. LG questions whether standalone claims in fact are more immediate, since they require a large amount of fact finding which will already have been carried out in the most part by the competition authority in a case of a follow-on claim.

- Paragraph 4.17 – the OFT reserves its position as to whether it should become a specified body for bringing representative actions. LG queries whether this a suitable role for the OFT. One of the reasons for promoting private actions is to free up OFT resources for pursuing hard core breaches of competition law. Should the OFT become a specified representative body in the sphere of private actions, this rationale will be undermined. Also, as a matter of public policy, the OFT's role is to pursue competition law infringements through its regulatory powers. Giving it a role as a representative

body in court actions would inherently alter the OFT's role in competition law enforcement.

- Paragraph 4.20 to 4.33 – LG has considered the OFT's arguments in favour of each of the two basic models for representative actions (claims being brought on behalf of named individuals or claims being brought on behalf of consumers at large). On balance, LG supports the first model in preference to the second. This is because, as stated in the discussion paper, as a matter of principle it should be for the individual to decide whether he wishes to become involved in litigation and who should represent him. If the focus on private actions is compensating individuals for their loss, rather than punishing participants in anti-competitive behaviour, then as a matter of logic only those individuals interested in pursuing their loss should be included in a representative claim. Even if this approach means that a number of claimants may be so low that a representative action is not viable, the principle still stands true. The other model suggests a more "litigation-happy" approach, which the OFT states it wishes to avoid encouraging. The variant to LG's preferred model, that additional consumers could join the action at a later stage, seems worthwhile. In particular, allowing a court to reach a declaration of liability and/or findings on quantum and causation could encourage individuals to come forward to join the action subsequently, as they would be aware that the claim has already, at least in part, been successful.
- Paragraph 4.40 – LG agrees in principle that lower value individual claims may benefit if they can be issued in county courts. However, LG questions whether such courts would have the detailed knowledge of competition law to hear such claims.

Costs and Funding Arrangements

- LG agrees in principle with the recommendations set out in this part of the discussion paper. LG's only concern is to ensure that third parties should not have the opportunity to use competition law claims to make excessive gains by way of, for example, interest on funding loans or conditional fee arrangements, as this could be undesirable from a public policy standpoint. In other words, if (for example) a claim were to be funded by a loan from private backers looking to "invest" in that claim to make substantial gains, this would run counter to the idea that competition law claims are aimed at recovering losses caused by parties affected by the breach of competition law.

Evidential Issues and Applicable Law

- Paragraph 6.11 to 6.17 – on balance, LG is in favour of the first option for the binding effect of decisions of other EU NCAs, i.e. for any decision made by any NCA to be binding in any courts in the EU as against the addressees of the decisions. Not only is this in line with the current position as regards decisions by NCAs in the UK, but it has the advantage of certainty. Were the second option (making decisions by NCAs binding in other Member States based on the principle of reciprocity) to be adopted, each of the 27 Member States would have to enter into a bilateral agreement with each of the other Member States for mutual recognition to be binding. This is administratively burdensome and could result in uncertainty for individuals if they are not easily able to establish whether such a mutual agreement has been entered into. However, neither option addresses the issue of what would happen if another NCA were to err in its assessment of a competition law issue, or if a decision of another NCA were subsequently to be overruled by a court in that NCA's Member State. These issues require further consideration.

Effective Claims Resolution and the Interface with Public Enforcement

- Paragraphs 7.7 to 7.9 – LG is not convinced of the need for a Competition Ombudsman. As noted by the OFT in the discussion paper, private actions are still developing. The

OFT itself has a very important role to play in competition law enforcement. Introducing a third tier of enforcement could prove unnecessarily bureaucratic. However, LG would be interested to see further proposals developed on this subject.

- Paragraphs 7.17 to 7.23 – LG does not think that the complete removal of joint and several liability for the immunity recipient should be adopted. If, as stated above, the focus on private enforcement of competition law breaches is to compensate the claimants for the loss they have suffered, rather than to focus on the harm caused by the defendant, then even if the defendant is in a position of immunity as regards the civil investigation by the OFT, the loss suffered by the claimant should still be relevant to the court action. LG therefore supports the second option, that claimants should be able to bring an action and obtain judgement against an immunity recipient under normal principles of joint and several liability, whilst empowering the court to allow that recipient to seek contributions of up to 100% from non-leniency recipients.

We would be happy to participate further in the OFT's thinking on private actions. Please contact Anthony Woolich on +44 20 7759 6549 or anthony.woolich@lg-legal.com and Rosemary Choueka, on +44 20 7759 6724 or rosemary.choueka@lawgram.com.

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