

June 2007

Linklaters' Response to the OFT's Discussion Paper on Private Actions
in Competition Law: Effective Redress for Consumers and Businesses
(OFT916)

Linklaters

One Silk Street
London EC2Y 8HQ

Telephone 020 7456 2000
Facsimile 020 7456 2222

Response to the OFT's Discussion Paper on Private Actions in Competition Law: Effective Redress for Consumers and Businesses (OFT916)

1 Overview

- 1.1** Linklaters welcomes the opportunity to provide comments on the OFT's recently published discussion paper on private actions in competition law: effective redress for consumers and business (OFT916) ("the Discussion Paper"). We note that the purpose of the Discussion Paper is to inform the ongoing debate on the issue of how to make redress for consumers and business for breaches of competition law more effective. The Discussion Paper is a welcome follow up to the European Commission's ("the Commission's") Green Paper, published in December 2005, in which the Commission initiated a Community-wide debate on this issue.
- 1.2** The OFT envisages that the eventual outcome of this consultation will be the making of recommendations by the OFT to the Government, the OFT itself taking action to facilitate effective domestic redress for breaches of competition law and the OFT responding to those Community-wide measures that are expected to be proposed in the Commission's forthcoming White Paper on damages for actions for breach of the EC antitrust rules. We agree that a multifaceted approach is warranted as encouraging private actions will require concrete legislative changes, as well as publicity and promotion by the regulators.
- 1.3** The scarcity of private actions for damages resulting from competition law infringements in the UK is evidence of the significant obstacles that prevent potential claimants from commencing proceedings to recover losses suffered as a result of breaches of competition law. A more effective legal system would undoubtedly benefit potential claimants who would otherwise be deterred from bringing meritorious claims to court.
- 1.4** The Discussion Paper sets out the principles that the OFT believes should inform improvements to the existing legal and structural system to ensure that it allows for effective redress and enhanced compliance with competition law, but without giving rise to a 'litigation culture' that may be harmful to legitimate business activity. We agree that the promotion of such a culture is undesirable. Having had experience of representing both claimants and defendants in this context, we think that it is also important to emphasize that a balance must be achieved between ensuring that an effective remedy is available to claimants for loss suffered as a result of breaches of competition law while at the same time ensuring that an unduly onerous burden is not placed on defendants. In light of the potential impact on litigation culture throughout the UK, the OFT's proposals require very careful consideration.

- 1.5** A number of the proposals set out in the Discussion Paper would, if implemented, represent significant departures from established rules regarding, for example, forum, costs and funding arrangements, impacting on both the substantive law and on procedure in UK courts. Particular care is required in light of the risk that implementation of some of the proposals could result in a considerable shift of the burden in litigation onto the defendant. Any measures adopted must therefore aim to achieve the right balance between claimants and defendants.
- 1.6** Whilst there are a number of sensible proposals set out in the Discussion Paper, we believe that other proposals warrant further consideration as to whether the suggested approach is either necessary or desirable. This is particularly so where the suggested proposals risk resulting in a proliferation of tribunals, an unfocussed approach and potentially greater uncertainty for competition law, both procedurally and substantively.
- 1.7** We turn now to discuss in more detail each of those aspects of the Discussion Paper that in our view warrant particular attention.

2 Representative actions

- 2.1** For indirect purchasers with relatively small individual claims, the risks and costs involved in individual litigation can often outweigh the potential benefits. The availability of representative actions facilitates the coordination of these claims and addresses some of the obstacles to these claims.
- 2.2** The OFT proposes broadening the availability of representative actions to potential competition law litigants in the UK, so that duly authorised bodies may bring both follow-on and stand-alone actions on behalf of consumers and businesses. This is promoted as a way of realising economies of scale and addressing barriers to individual action, and expands the existing follow-on representative actions on behalf of consumers currently available before the Competition Appeals Tribunal (the “CAT”) under the Competition Act 1998.
- 2.3** Whilst facilitating more representative actions by appropriate bodies is to be encouraged, proposals for proliferation of tribunals such as allowing lower value private actions to proceed before county courts (for individual claims) introduces an unnecessary layer of complexity. Extending the powers of specialist judges in the CAT to hear stand-alone claims on behalf of consumers and businesses and follow-on actions on behalf of businesses as well as consumers would be preferable to proliferating claims before courts without specialist competition knowledge.
- 2.4** In our view, a proliferation of tribunals will incur unnecessary costs and risk significantly slowing down the system. This proposal brings to mind the experience in the beer ties litigation, in which consolidation of claims with similar subject matter was ultimately the

preferred approach. In that litigation, proceedings were started in a variety of courts around the country but ultimately claims were consolidated in the High Court, with the selection of a test case for the court to consider.

- 2.5** We also note that the first representative damages claim, brought by The Consumer's Association against JJB Sports plc, has been commenced in the CAT. This claim will give the CAT the opportunity to provide useful guidance on representative actions. To seek to expand and amend this area by promoting claims before other tribunals before the first representative action goes through the CAT is, we consider, premature.
- 2.6** A proliferation of tribunals would also render competition law jurisprudence particularly vulnerable to inconsistent judgments, which would potentially discourage private actions in an area of law where many of the applicable legal principles are underdeveloped and their application uncertain.
- 2.7** While we understand that the intention underlying the county courts proposal may be to give an alternative forum to smaller individual consumer claimants/claims by small businesses, the supposed benefits for these types of claimants would have to be weighed up against the negative aspects outlined above. There must also come a point at which defendants have some certainty about their position in terms of potential future litigation. In our view, the better proposal is the encouragement of stand-alone and follow-on actions before the CAT, and greater promotion of representative actions in that forum, which would avoid the pitfalls outlined above, while ensuring that a remedy is available to all.
- 2.8** As a final note, any proposals to facilitate actions on behalf of a group of claimants must, as a matter of necessity, guard against promoting lawyer-driven class action cases of the type often seen in the United States. We note the OFT's argument that the representative body's lack of pecuniary interest in the outcome of the litigation will effectively operate as a control over the conduct of the litigation. This, in addition to a principled approach permitting disclosure and the passing-on defence (discussed below), tempered with judicial discretion on issues such as costs, damages awards and vexatious litigation, should help to ensure that representative actions can usefully facilitate litigation by groups of genuine claimants, whilst avoiding a US style litigation culture.

3 Fund management and 'cy pres'

- 3.1** We note the argument put forward by the OFT in the Discussion Paper that a model in which a representative action may be brought on behalf of consumers at large requires an effective system for the management and distribution of the proceeds arising from any such action. If the proceeds are not distributed in their entirety, one suggestion is that the remaining funds be used for the benefit of consumers falling within that category (along the lines of a 'cy pres' system).

3.2 Any provision for the management of funds accruing under a competition law claim needs the most careful consideration and could only work within a strictly defined framework. The Discussion Paper does not expand on the framework envisaged by the OFT to regulate a cy pres system. We have therefore not considered the proposal in any detail, but would welcome the opportunity to do so at the appropriate time.

4 Costs and funding arrangements

4.1 The considerable costs involved in litigation can be a key deterrent to potential claimants. Costs and funding arrangements are therefore seen as a major incentive to the bringing of well-founded private actions.

4.2 We note that one of the OFT's proposals aimed at introducing an incentive to litigate well-founded claims is that conditional fee arrangements be permitted that allow a percentage increase on fees greater than 100% if a case is won. However, it is not clear why competition cases should merit different fee arrangements to other (potentially more deserving) cases. Indeed, the Discussion Paper provides no justification as to why such a measure should be introduced in respect of competition cases alone. The wider implications of such a measure cannot be ignored in light of the potential ripple effect of such a proposal on other types of litigation. For this reason the implementation of this proposal would require very careful consideration to ensure that knock-on effects for litigation more generally are properly thought through and addressed.

4.3 A more appropriate method of dealing with the obstacles imposed by costs would be to encourage and facilitate judicial discretion as to costs in private actions for breaches of competition law. A court could, for example, limit recovery by defendants to a certain proportion of their costs in circumstances where the unsuccessful claimant nevertheless established an arguable case at the outset and acted reasonably throughout proceedings. Whilst this is an area where judicial discretion should be used, clear guidelines will be required to ensure consistency in approach.

4.4 Care must also be taken to ensure that vexatious litigants are not encouraged to bring highly speculative claims. We would advocate consistency in the approach of awarding costs to successful parties, where the successful party recovers the majority of its costs. This acts as a disincentive to opportunistic litigation and a reward for claimants who have brought appropriate proceedings.

5 Infringement decisions

5.1 Infringement decisions by UK national competition authorities ("NCAs") (i.e. the OFT and the Competition Commission) and decisions by the Commission are binding on English courts in private actions for damages where the action concerns the enforcement of either

UK or EU competition law. In contrast, a decision enforcing national competition law or EU competition law taken by an NCA in another Member State will not bind an English court. In the Discussion Paper the OFT proposes cementing the status of the decisions of other EU NCAs by making those decisions binding before the courts of all Member States, as far as those decisions concern EU competition law. This would be achieved either by an EU-wide alignment or by reciprocal alignment.

5.2 We consider this to be a sensible proposal that is consistent with developing the role of NCAs in enforcing EU antitrust rules. A consistent EU-wide approach rendering such decisions binding on national courts would undoubtedly encourage private actions.

5.3 A less straightforward question arises when considering whether the decisions of NCAs on the application of national competition rules should also be binding. In our submission the decisions of NCAs on the application of national competition rules should be binding on the courts of that Member State, but should only be authoritative in the national courts of other Member States. The requirement that national courts are not bound by, but should take account of the decisions of other Member States' NCAs relating to the enforcement of national antitrust rules reflects the need for national courts to have discretion to address possible differences that may arise between national competition rules.

6 The passing-on defence

6.1 In order to assist potential claimants in overcoming evidential barriers in bringing competition claims, the OFT suggests providing that whilst a claimant must prove that he has suffered loss, the burden of proving that the claimant has 'passed on' that loss to customers should lie with the defendant.

6.2 We believe that the most equitable result consistent with existing legal principles is to allow claims by both direct and indirect purchasers, and permit the passing-on defence to be relied on by defendants. In order to mitigate the burden placed on claimants in proving their loss, the burden of proving that claimants have passed on the overcharge would be reversed in certain circumstances:

6.2.1 In the case of direct purchasers, the burden of proving that passing-on has occurred would be reversed and would lie with the defendant. This would ensure that the availability of the passing-on defence does not unduly deter all claims, but at the same time, fundamental legal principles are not undermined.

6.2.2 In the case of indirect purchasers, the burden of proof would not be reversed, and indirect purchasers would have to prove that they suffered loss. We believe that passing-on will generally be more of an issue for direct purchasers, which justifies the reversal of the burden of proof in those cases.

6.2.3 In the event that both direct and indirect purchasers can recover, the question of allocation of loss among claimants is addressed as the defendant can rely on the passing-on defence, so that in each case, the issue as to whether loss was in fact suffered will be examined.

6.3 Permitting defendants to rely on the passing-on defence with these limitations imposed in terms of scope will, we believe, ensure that a fair and reasonable solution is reached for all parties without undermining fundamental legal principles.

7 Effective claims resolution

7.1 It is clearly in the public interest to seek the effective, and preferably early, resolution of civil proceedings. Measures such as encouraging the early exchange of information between parties to proceedings, and providing consumers and businesses with clear and user-friendly information about private competition law actions, are useful proposals that would encourage effective claims resolution.

7.2 The OFT also proposes ensuring that leniency documents are not discoverable without the consent of the leniency applicant. We welcome the OFT's approach to the protection of these documents from inspection and use in civil litigation, as it is a sensible means of ensuring the effectiveness of the leniency programme. The obvious risk to the leniency programme without such protection is that in the absence of guaranteed confidentiality, businesses will be reluctant to come forward with information about cartel activity that they are involved in. The end result, it is feared, would be a smaller proportion of cartels uncovered.

7.3 Excluding leniency applications from the disclosure process other than where consent has been obtained and putting into place robust confidentiality provisions where such documents are disclosed, is paramount to ensuring that the incentive to apply for leniency is preserved. The OFT's proposal to grant the courts the power to apportion liability between cartelists (who are joint and severally liable) by varying the amount of the contribution recoverable from non-leniency applicants, is another practical means of safeguarding the effectiveness of the leniency programme.

8 Applicable law

8.1 The Discussion Paper raises for debate the issue of the law applicable to competition law claims. The OFT argues that in cases where several different laws are being applied by the court to the same case (a common feature of competition law claims where competition infringements often affect the market in more than one country), the costs of private actions are raised and the outcome of the case is less predictable. The OFT therefore proposes that where the restriction of competition affects, or is likely to affect, the market in more

than one country, the claimant who brings an action in the court of the domicile of (one of) the defendant(s), may instead choose to base its claim on the law of the court seised.

- 8.2** We note that ongoing discussions at Community level on the proposal for a regulation on the law applicable to non-contractual obligations (Rome II) have considered this point and that it is envisaged that the proposed Regulation will address the question of applicable law in competition law cases. Achieving predictability, consistency and efficiency in the adjudication of competition law disputes is the most desirable means by which to develop competition law. Certainty on the issue of applicable law will assist in the promotion of private actions.

9 Closing comments

- 9.1** Any measures that are ultimately taken to improve the system for private enforcement of competition law breaches must have as their overarching goal a coherent and principles-based approach. This approach must not be unduly complicated and must be applied by the courts, nationally and on an EU-wide scale, in a consistent manner.
- 9.2** We welcome the emphasis in the Discussion Paper on the importance of ensuring consistent and coherent development of competition policy, and to this end, the suggestion that the courts should have regard to UK NCAs' decisions and guidelines when determining competition law issues in relevant cases.
- 9.3** When implementing measures in pursuit of these aims, regard must also be had to the equilibrium needed to ensure the system is fair and just: the right balance must be achieved between claimants and defendants. At the heart of the ongoing debate lies the key question: why are there so few private actions? The answer to that question is clearly complex, but the dearth of private actions reflects the fact that follow-on actions, which comprise the overwhelming majority of private actions for breaches of competition law, will often be ripe for settlement. The issue for the defendant in such cases will therefore often be when, rather than if, it will pay out to the claimant. Equally, stand-alone actions will always be an extremely onerous prospect for any claimant. Whilst we encourage those sensible measures aimed at ensuring access to justice for meritorious claimants, the realities of private enforcement must not be forgotten. Great care must be taken to ensure that a balance is achieved between encouraging private enforcement and ensuring that an undesirable litigation culture is avoided.

Linklaters

June 2007