

## **MACFARLANES**

### **NOTE**

#### **OFFICE OF FAIR TRADING: DISCUSSION PAPER**

#### **PRIVATE ACTIONS IN COMPETITION LAW EFFECTIVE REDRESS FOR CONSUMERS FOR BUSINESS**

Macfarlanes welcomes the opportunity to comment on the OFT's Paper on third party damages actions for breach of the UK and EU competition laws.

We strongly support the OFT's work in trying (a) to facilitate more effective redress for third party losses caused by competition law infringements and (b) to enhance overall compliance with the competition rules without however stimulating a detrimental "litigation culture" in the UK.

This Note will provide first, comments and concerns in respect of the general thrust of the Paper and second, comments on particular issues raised by it.

- The Paper has been issued in the interim period between the publication of the European Commission's Green and White Papers. The Green Paper identified numerous obstacles to facilitating private actions and the Commission subsequently received a large number of well-considered, thorough and pertinent comments on this.

We believe that the Paper is timely in so far as it seeks to facilitate private actions in the UK, but also consider that Member State regulators/legislators should not take any national initiatives until the White Paper has been published (at the earliest). In so far as the Green Paper raised numerous difficult matters of common concern to all Member States, the White Paper will presumably reflect the input from the Commission's EU-wide consultation and hopefully provide a workable lowest-common-denominator format for an EU-wide blueprint (which should therefore reduce the risks of "forum shopping"). We therefore consider that it would be preferable to postpone further deliberation of these issues and respectfully suggest that no measures should be implemented (or be significantly advanced) until the White Paper has been published.

The OFT has undoubtedly been very progressive in this area, but we believe that it is important to avoid a situation in which the EU's and OFT's efforts will run along parallel rather than convergent lines. Consequently we consider that some of the Paper's

recommendations are somewhat premature. If the UK marches significantly out of step with most of its EU counterparts, there will be a danger of the UK becoming the forum of choice for a disproportionate number of court cases, which might inadvertently stimulate to an unwelcome “litigation culture” in the UK of the sort the OFT is understandably keen to avoid.

- That said, some of the initiatives advocated in the Paper relate to improving the structural and legal elements for bringing private actions based on competition law which are already in place in the UK and these are very usefully explored in the Paper. Whilst we consider that there is no need for developments to the UK’s legal and structural framework in this area that would pre-empt the White Paper, it will certainly be useful to have an ongoing discussion about how the existing UK structure can be developed in directions which are compatible with the central issues of the Green Paper.

An important preliminary comment is that we does not support proposals to adapt the general law enforcement rules to facilitate the enforcement of competition law, except in very exceptional circumstances. The existing structure for the enforcement of competition law in the UK is already relatively advanced and lends itself to expansion and improvement without compromising general principles of law enforcement. In other respects this Note confines itself to areas in which the UK system already has an uncontroversial head start over the core Green Paper proposals.

In summary, the UK has already heard private actions in its domestic courts, has set up a specialist competition court (the Competition Appeal Tribunal (the “CAT”)) and established a framework for certain types of collective actions.

- The OFT is rightly concerned about the disparities between the judicial policies and procedural rules of the courts of different Member States and the consequent need to level the playing field by some form of European harmonisation. We are concerned that the call for more stand-alone actions in national courts may inappropriately result in competition law developing through the multiple national courts (which are unlikely to be able deliver consistent judgements at this stage) rather than, in the first instance, through the regulators and the EU judicial system. This inevitable disparity in national decisions is also why any call for treating as binding even the decisions of the national regulators with extreme caution.

- We strongly believe that public and private enforcement should go hand-in-hand as deterrent measures. However given the often complex nature of competition cases we consider that private actions in the UK will largely derive from decisions taken by public authorities such as the OFT. We are concerned that trying to encourage more private actions whilst at the same time limiting the number of cases the OFT may pursue (in accordance with its case prioritisation criteria published in October 2006) may actually reduce the number of private actions – at least in the short to medium term.
- In practical terms, continued commitment to public enforcement appears to be the only viable approach. Follow-on actions have much more realistic chances of success than stand-alone actions, as it is necessarily for more difficult for a claimant to adequately identify and prove infringements without the benefit of a prior decision by a regulator or a Community court. If the public enforcement agencies with their wide powers of search and seizure often find it difficult to pass convincing infringement decisions in a timely manner (as evidenced, for example, by the number of cases that have been closed by the OFT and which seem to have concerned some element of infringement), then successfully pursuing a private action would appear to be an extremely difficult task for private claimants.
- Moreover, the courts in which competition cases can be brought should not be extended at this stage. Competition law cases, which inevitably incorporate sophisticated and relatively unfamiliar legal arguments and economic concepts, should remain confined to the High Court or the CAT. Also given the likely value of a claim for damages for an infringement of competition law it is questionable whether lower courts are the appropriate forum for such actions.

The UK system is already progressive in this respect, offering both the opportunity for collective actions and a specialist competition court. We consider that this court should be given a wider jurisdiction, rather than letting lower courts get involved in cases of this type. The High court also has jurisdiction to hear competition law claims. Any case involving competition law will, by its very nature, be too complex to suit the lower courts and it would be wasteful and ineffectual to keep training lower court judges in this area. The number of stand-alone cases which might be brought in lower courts by either individual claimants or representatives is unlikely to be significant by definition, and of the (few) foreseeable stand-alone cases, most would need to be heard by more specialised High Court judges. The choice of court should for any case, whether stand-alone or

follow-on should therefore be between the High Court and the CAT. We consider that where feasible, it should be preferable to use the highly specialised and generally less costly CAT but notes that the High Court must remain occupied with competition law matters not only as a matter of basic right but because competition law issues so often arise in the context of cases dealing with a variety of issues such as corporate or commercial or intellectual property law.

We believe that the OFT should concentrate primarily on follow-on claims, be they on an individual or collective basis, when deliberating on how to facilitate successful private damages actions. The UK is already well placed to foster such actions, and should focus initially on making them initially more accessible to potential plaintiffs (through expanding the availability of collective actions) and later, after the White Paper, on modifying aspects thereof which can be shown to seriously impede processing the actions. If matters are tackled in this order, then the UK may lead an EU-wide improvement in the viability of national actions and avoid the most detrimental aspects of forum shopping (with all roads leading to the UK).

- We consider that any move to facilitate standalone actions beyond the current position is premature. Major businesses are already able to launch a High Court action if they wish to. But such action is very unlikely to be economic or otherwise beneficial to small businesses or consumers, even under the guise of a representative action.
- We consider that on balance the advantages of user-friendly representative actions outweigh their possible disadvantages and that they should be opened up to more potential claimants in accordance with the suggestions in the Paper.

We endorse the suggestions first, to broaden the identity of designated “representatives” on a case-by-case basis and second, to enable businesses (as well as consumers) to bring collective actions. Small businesses would easily find it as hard as consumers to bring claims and should therefore also be able to benefit from collective actions. There is no good reason to exclude larger businesses in this respect, although large organisations with deeper pockets may anyhow tend to want to go-it-alone to maximise on their individual leverage for settlement purposes.

We consider that the scope of persons who can benefit from representative actions must be expanded to include small businesses, regardless of whether or not the passing-on defence can be pleaded. Small businesses may be better placed and more motivated to

support the plaintiffs in representative actions. Consequently Macfarlanes thoroughly endorses the OFT's view that businesses should be able to bring follow-on actions in the CAT.

We consider that there is no reason to preclude stand-alone actions from being litigated in this way. However, as already mentioned, the viability of such actions appears slim, as private claimants have very limited resources as compared to public enforcement agencies and if such actions are to have any chance of success, it is essential to enable claimants to group together to cooperate within the framework of collective actions.

- The OFT clearly, and rightly, seeks to enhance the viability of bringing private actions whilst also staying alert to the danger of crating a “litigation culture”. The Paper tries to differentiate between US style “class actions” and actions which it designates as “representative actions”. Macfarlanes considers that the distinction is unavoidably artificial in this context. That said, this should not interfere with a pragmatic initiative to encourage private actions, but these consequences do need to be openly recognised as inevitable.

Macfarlanes

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