

**RESPONSE OF MONCKTON CHAMBERS TO THE OFT’S DISCUSSION
PAPER *PRIVATE ACTIONS IN COMPETITION LAW: EFFECTIVE
REDRESS FOR CONSUMERS AND BUSINESS*¹**

1. The Office of Fair Trading (“OFT”), the Department of Trade and Industry and the European Communities Commission (“Commission”) have all publicly committed themselves to the proposition that private actions for breaches of competition law should be a valuable concomitant of public law proceedings by the competent authorities in ensuring effective implementation and enforcement of the duties imposed by national and EC competition law. The same bodies and HM Treasury have also expressed the view that such implementation and enforcement of competition law make an important contribution to the maintenance and development of a healthy and innovative economy in which resources are allocated in an optimal way and in the interest of consumers.
2. Members of Monckton Chambers welcome such an approach. This paper sets out some thoughts on how to give practical effect to this approach by reference to the OFT’s Discussion Paper *Private actions in competition law: effective redress for consumers and business* (“the Discussion Paper”). We think it is important to distinguish between what have been termed “follow-on” actions (*i.e.* actions following the establishment of liability by a public enforcer of competition law) and actions that start from scratch in the absence of a public liability finding, which we will call “stand-alone” actions. The most common and generally the most attractive private actions are those brought following, and on the basis of, a public law finding of infringement.
3. The title of the OFT’s Discussion Paper might suggest that it would encompass consideration of the role of private actions for injunctive relief (whether on an interim or final basis). Certainly, a number of private actions have been brought with a view to seeking injunctive relief. It may be thought that, given the constraints on the OFT’s ability to grant appropriate interim measures in a number of cases, this type of private action has an important role to play in

¹ Inevitably individual views will differ. The intention of this paper is to provide a composite assessment, but not all members of Monckton Chambers necessarily endorse all the points made.

protecting the interests of competition or preventing distortions of competition. Self-evidently, damages claims can only remedy the damage consequent upon the distortion of competition whereas an injunction might be able to prevent it altogether. It might be appropriate, therefore, to consider whether the interests of competition are adequately served by a procedure in which relief is sought at a point at which the court can reach only preliminary views on key matters of fact and economic analysis. In particular, in many cases the availability or otherwise of urgent injunctive relief may turn on the ability to produce, in a short time, adequate evidence on relevant market definition. This can be a difficult enough task in any proceedings, let alone in an application for urgent relief.

4. There is also a specific reason why changes or improvements to the damages regime cannot and should not be considered in isolation from their impact upon the availability of injunctions, in particular interim injunctions. In exercising its jurisdiction to grant interim relief, the court will generally consider whether damages would be an adequate remedy; in principle, therefore, the more adequate damages would be as a remedy, the less likely it is that injunctive relief will be granted to pre-empt the threatened distortion. Perversely, therefore, the more readily available, and the more ample the damages remedy, the less likely it might be that claimants with a genuine case for interim injunctive relief would obtain the relief they deserve.

FOLLOW-ON ACTIONS

5. We consider that follow-on actions are now becoming part of the legal landscape. There is considerable evidence that companies are now seeking - and obtaining - compensation following an infringement decision taken by the OFT or Commission.
6. Although parties have a choice between bringing proceedings in the High Court and the Competition Appeal Tribunal (“CAT”), all follow-on actions have been brought in the CAT. Follow-on actions are considerably simpler to pursue than stand-alone actions, since there is no need to prove liability. The main issues in

follow-on actions are causation and quantum. In a sense it is counter-intuitive that follow-on actions are all being brought in the CAT, since one would have thought that the High Court had equivalent (or indeed greater) expertise on the issues of causation and quantification. The fact that follow-on actions are nonetheless being brought in the CAT suggests to us that the availability of a specialist competition court is an important factor in ensuring that private competition enforcement flourishes.

7. We have no doubt that the risk of having to pay such compensation greatly reinforces the deterrent effect of the risk of public law fine in an area where economic deterrence is particularly important: the relevant infringements are generally committed for the purpose of economic gain and are liable to be perceived to be economically rational unless the feared cost of the results of detection exceeds the expected economic gain multiplied by the perceived improbability of detection.
8. We agree with the OFT's suggestion² that, as part of its administrative procedure, it would be appropriate to encourage undertakings against whom it proposes to take enforcement action to provide redress to those who have suffered loss due to infringements. This is particularly true in cases where the loss has been suffered by consumers where there are still formidable problems for consumers recovering in a follow-on action.

STAND-ALONE ACTIONS

9. It is here that we see quite a large competition enforcement "gap".
10. For reasons of resources, the OFT has taken a policy decision to limit the number of enforcement actions it takes : 25-40 a year out of 1200 complaints, see the OFT's evidence in *Cityhook*. The reality is that virtually none of the case closure cases are pursued as private actions. This leads to what we term a competition enforcement gap. As the CAT pointed out in *Cityhook*:

² Discussion Paper at [7.24]-[7.26]

“ If neither claimants in private actions nor the relevant competition authority have the resources to be able to challenge the anti-competitive behaviour of companies with substantial means, then the effectiveness of competition law enforcement in the UK would be seriously undermined. It could also be very damaging to the competitiveness of the affected markets.” (paragraph 211)³

11. While some of the complaints may lack merit, there are almost certainly many that are no longer pursued on resource grounds. If the OFT has limited resources, so too do many SMEs and consumers who are advised that they are victims of anti-competitive conduct. The CAT in *Cityhook* spelt out some of additional hurdles faced by a person who wishes to bring a private action:

- (a) a claimant does not have the investigatory powers of the OFT;
- (b) any material that the OFT obtains cannot be made available to the claimant; and
- (c) OFT action could hamper subsequent evidence-gathering in private court proceedings.

12. What should be done? We make the following recommendations.

i) Availability of the OFT's information-gathering powers for private actions

13. A problem that commonly faces would-be claimants of compensation for loss that they have suffered as a result of a believed breach of competition law is the difficulty of establishing the relevant facts. The OFT enjoys wide powers to investigate facts in the possession of both the alleged infringer and third parties. Such wide-ranging powers are not enjoyed by would-be private claimants. A claimant is normally only entitled to disclosure of documents once pleadings have closed.

³ [2007] CAT 18

14. The OFT seems to have taken the view that its approach to opening an investigation is all or nothing - in the sense that it will now open a Competition Act 1998 (“CA98”) investigation on a case only if it is a case that (on the assumption that evidence is there) merits going to a final decision. However, we think that there is merit in the OFT opening more investigations and then, at a later stage, deciding whether to continue the case itself or to provide the evidence that it has gathered to the complainant, who could use that evidence in a private case. This approach would have particularly merit in dominance cases, where it may be difficult to establish the relevant market.
15. Currently the Enterprise Act 2002 (“EA02”) imposes very severe restrictions on the ability of the OFT to disclose such information to third parties. Subject to provision of appropriate protection of legitimate business secrets, the OFT should be legally free to pass to would-be claimants of compensation information collected by the OFT through use of its investigatory powers in cases where the OFT decides not to continue with public law enforcement. That would require an amendment of the EA02. It would, however, make it easier to establish a liability finding which is currently is a major barrier to stand-alone claims.
 - ii) *Give the CAT jurisdiction to adjudicate on all private competition claims*
16. The CAT was set up as a specialist competition Tribunal to hear appeals from the OFT and sectoral regulators. Its jurisdiction was then extended to hear follow-on actions where liability has been established. Currently it does not have jurisdiction to hear cases where liability needs to be established -which are precisely the type of cases that fall within its expertise. We regard that as somewhat paradoxical. We think that the time has come to enact rules under section 16 EA02 enabling the CAT to hear stand-alone actions.
17. Such a move would undoubtedly remove a barrier (or perceived barrier) to bring private competition cases. Rightly or wrongly, the CAT is seen by claimants as being more user-friendly and more knowledgeable in competition law than the

ordinary courts. This is borne out by the fact that all follow-on actions of which we are aware have been brought in the CAT when they could equally well have been brought in the High Court. In a sense there is nothing surprising in this. In many areas where there is specialist law (*e.g.* immigration, employment, tax) there are specialist statutory tribunals (albeit that we are not aware of any tribunal that has a power to award common law damages).

18. It might be said that just because claimants like bringing cases in the CAT, that is not sufficient justification for widening the CAT's jurisdiction. Defendants may prefer the High Court because they may feel the approach in the High Court to the issues and evidence is more rigorous than in the CAT. We are not persuaded by that argument. We have no reason to think that the CAT will not be able to ensure a rigorous approach to issues and evidence. In this context, one must not forget that all Chancery judges are able to sit in the CAT. Further, we understand that the next CAT President will be a High Court judge. We have also heard it suggested that extending the CAT's jurisdiction would undermine or compromise the OFT's role in developing competition law. We think that this is unlikely to happen. Even if, however, that were to happen, we would not see that as a reason for not extending the jurisdiction of the CAT. It would, in our view, be unattractive not to extend the CAT's jurisdiction (which would undoubtedly facilitate private claims) on the basis that it would undermine or compromise the OFT's role in developing competition law when the OFT now closes over 1,000 complaints a year on the basis of priorities or lack of resources.

iii) *Exemplary damages*

19. The importance of competition law enforcement is recognised by the fact that there are both public and private enforcers, that fines can be imposed for a negligent or intentional infringement of competition law, and that cartels now create liability under the criminal law. Although UK/EC case law indicates that exemplary damages are in principle available for competition law breach⁴, we

⁴ *Kuddus v Chief Constable of Leicestershire* [2001] UKHL 29; Case C-295/04 *Manfredi*

would in the circumstances welcome legislation which expressly acknowledges and clarifies the courts' power to award exemplary damages in competition law cases. This would not mean that exemplary damages would have to be awarded in every case. Exemplary damages could be awarded in accordance with the general common law rules on damages. In cases where the OFT did not bring enforcement proceedings, the OFT would be able to make representations on the question of exemplary damages in its capacity as national competition authority (pursuant to the provisions of Regulation 1/2003/EC and the Competition Law Practice Direction).

20. Underlining, in this way, the ability of a court to award exemplary damages would not only act as an incentive for victims of anti-competitive behaviour to bring actions but would also give effect to the importance of the public law dimension to competition law.
21. However, some clarification will need to be given to the relationship between any punitive element of the damages and the punitive element of fines imposed by regulators. Where the OFT or other regulator has already established the appropriate punishment (or has decided that punishment is inappropriate), it may be unclear whether or why the court should be able to add to that punishment by awarding damages beyond the compensatory level.

iv) *Improve the costs position*

22. Individuals and SMEs, even if joined together in "action groups", are quite likely to be deterred from bringing private actions by their cost. Consideration might be given to greater availability of protective costs orders. That said, these considerations should be balanced against the need to ensure that claimants face appropriate costs sanctions for bringing claims that ultimately fail, particularly given that such claims are, *ex hypothesi*, brought purely for the benefit of the claimants rather than to establish some point of wider public importance.
23. We would also suggest that, in applying its prioritisation criteria to any particular case, the OFT should, in asking itself whether it is "best placed to

tackle the problem” or whether the case may be better suited to private enforcement, take account of whether the cost of bringing proceedings would, in the circumstances, be likely to deter any potential litigant.

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