

Olswang Response dated 12 June 2007 to OFT Consultation, *Private actions in competition law: effective redress for consumers and business.*

Paragraph no.	Paragraph (Section headings in bold)	Comment
<b>Possible action at EU level</b>		
4.5	<i>The ability of groups of consumers and businesses collectively to seek redress for infringements of competition law is likely to make the threat of action all the more credible. This should encourage those who have breached competition law to seek to resolve claims made against them, as well as encourage compliance more generally. To ensure that there is an adequate level of protection throughout the EU, it may be appropriate for a Community instrument to require all Member States to ensure that there is an effective collective means (especially for consumers) to bring claims for breaches of competition law in the relevant Member State. The choice of the appropriate (effective) form of collective action could be left to the Member States.</i>	There are significant benefits in facilitating an effective collective means of redress both for consumers and SMEs. A Community instrument should not only be "especially for consumers".
<b>Possible action at the domestic level</b>		
4.7	<i>With respect to individual standalone claims (which can currently be brought before the ordinary courts), it appears that the difficulties in doing so faced by potential claimants (particularly consumers and small and medium-sized businesses) have proved to be prohibitive in many instances. Standalone claims can, however, in addition to ensuring effective redress, provide an additional and more immediate corrective mechanism in markets affected by anti-competitive behaviour, since they can be brought before the conclusion of a (potentially</i>	Not only would litigation provide "an additional and more immediate corrective mechanism", in some instances it would provide the only mechanism for redress following an infringement of competition law. The OFT has acknowledged that it only has limited resources to investigate the many complaints it receives annually. It is important from the perspective of creating a competition law compliance culture,

	<i>lengthy) investigation by a competition authority, or in the absence of any investigation at all. For these reasons they should be facilitated.</i>	as well as for ensuring compliance with the E.C. law principle of effectiveness (that the exercise of Community law rights is not rendered excessively difficult), that the ability to enforce competition law rights in the courts is a real one.
4.9	<i>In addition, effective and efficient case management by the courts is capable of ensuring that a balance is struck between the need to encourage an appropriate level of redress and the desire not to introduce any measures that might result in courts and businesses being burdened with ill-founded actions.</i>	We agree that it is a difficult balance to strike. When considering this issue, it is important to remember that the financial disincentives against bringing a claim (which the OFT is currently trying to address) include not only the costs of bringing an action but also the potential liability to an opponent's costs if the case is lost. In stand-alone actions (which do not rely on an European Commission/OFT finding of infringement), such costs could be significant and could act as a serious deterrent to potential claimants, in particular SMEs.
<b>Representative body status</b>		
4.15	<i>Bodies that are designated to bring representative actions on an ongoing basis must be subject to appropriate safeguards and should be required to meet objective, transparent and non-discriminatory requirements (similar to those that have already been drawn up for bodies specified for the purposes of section 47B of the CA98 (Claims on behalf of consumers - Guidance for Prospective Specified Bodies).</i>	This seems a sensible suggestion.
4.16	<i>Similarly, the criteria to be applied by the courts when authorising bodies to bring representative actions should be objective, transparent and non-discriminatory, and could be laid down for these purposes in secondary legislation.</i>	This seems a sensible suggestion. Laying this down in secondary legislation would provide clarity for potential claimants.

<b>Effective and flexible case management powers for the court</b>		
4.19	<p><i>Although it is likely that some new or additional powers would need to be conferred expressly upon the courts for the purposes of dealing with certain aspects of representative actions in competition law, it is worth noting that the courts in England and Wales already have experience of managing a form of collective action - group litigation orders are available in the courts in England and Wales under Part 19 of the CPR. Accordingly, it appears that the courts in England and Wales, in particular, are likely to be well equipped to deal with representative actions.</i></p>	<p>There are also strong arguments for having such representative actions heard before one specific tribunal, e.g. the CAT, as claims under section 47B CA 1998 currently are. This is because there are (or will be) a number of specific issues to be dealt with. To have them proceed before a non-specialist tribunal has the potential to increase costs.</p>
<b>Identification of claimants: models for representative actions</b>		
4.21	<p><i>The arguments for and against each of these models for representative actions are examined below, focusing on the following areas:</i></p> <ul style="list-style-type: none"> <li>• <i>whether claimants should be required expressly to state that they wish to participate in a representative action</i></li> <li>• <i>the effect of each model on business compliance with competition law</i></li> <li>• <i>consideration of economies of scale versus the increased complexity of representative actions</i></li> <li>• <i>how claimants may be identified through effective publicity, and at what stage of the proceedings, and</i></li> <li>• <i>alignment of incentives of claimants and representative bodies, and how compensation funds might be managed.</i></li> </ul>	<p>The choice as to whether consumers or SMEs may "opt-in" or "opt-out" of representative actions goes to the heart of the balance between a compliance culture and a litigation culture. This choice is particularly relevant for cartels and anti-competitive activity in the retail sector. Here, the only parties able to enforce competition law rights in the courts and deter anti-competitive activity are consumers. Accordingly, the proposals outlined in paragraphs 4.25 to 4.26, in favour of the opt-out regime, seem particularly compelling.</p> <p>These proposals are also meritocratic in the sense that they genuinely empower consumers and SMEs with the means to enforce their competition law rights and to deter those who harm them anti-competitively. If reforms are introduced which have the practical consequence of preventing actions being brought on behalf of consumers and SMEs, or reducing</p>

		<p>the deterrence effect of such actions, this acknowledges, as a policy choice, that the State (whether through the OFT or another body) is better placed to enforce competition law on their behalf.</p> <p>The efficacy of deterring anti-competitive activity through consumer court actions (or bodies representing them) will also be affected by the courts' approach to exemplary, punitive and restitutionary damages, which is outside the OFT's consultation.</p>
<p><b>Individual actions in county courts in England &amp; Wales</b></p>		
<p>4.41</p>	<p>We do not envisage that this would involve representative actions being brought before county courts</p>	<p>Allowing claims in the county courts has the potential to introduce an extra layer of complexity on the basis that county courts are unlikely to have specialist competition law knowledge.</p> <p>That said, it is important to have the flexibility to deal with different factual situations and to ensure that the exercise of Community law rights is not rendered excessively difficult. On this basis, the proposal in paragraph 4.40 seems sensible and proportionate.</p>
<p><b>Funding</b></p>		
<p>5.3</p>	<p><i>One way to alleviate the funding problems and financial disincentives faced by claimants in bringing private competition law actions could be to improve and widen the available means of privately funding civil actions and insuring against</i></p>	

*unfavourable outcomes. Currently, a claimant lacking the resources or willingness to bear all the risk himself may fund litigation through a combination of some or all of the following:*

- a conditional fee agreement: solicitors and counsel agree to receive no payment or less than normal payment if the case is lost but normal or higher than normal payment if the case is won*
- after-the-event insurance: the claimant can take out an insurance policy against the risk of losing the case. If the case is lost, the claimant's disbursements and the other party's costs are covered by the insurance. However, it is currently not easy for claimants in competition law cases to find a suitable after-the-event insurance policy, and*
- loans: the claimant may take out a loan to fund the disbursements, the expert witnesses' fees, and the premium for the after-the-event insurance. The loan may be on terms that it is not repayable in the event that the claimant loses. The interest on the loan is not recoverable from the other party and may be deducted from the damages recovered. If the case is ultimately lost and the claimant is unable to pay the other party's costs, the professional funder is only liable for the costs of the opposing party to the extent of the funding provided.*

Conditional fee arrangements are the least problematic aspect of funding arrangements as potential claimants can already negotiate reduced (or no) fees through conditional fee arrangements.

The usefulness of after the event insurance policies wholly depends on the level of the premiums charged. In relation to funding generally, facilitating affordable premiums (and financing for what may be significant disbursements) is arguably key to ensuring that SMEs and consumers can privately enforce their competition law rights.

**Liability of professional funders**

5.5	<p><i>The extent to which a professional funder should be liable for the costs of the opposing party is an important issue. The market for the provision of funding helps to ensure effective access to justice. Liability for costs (albeit only to the extent of the funding provided) is likely to decrease the supply of funding for civil litigation. While in certain cases the professional funder will simply demand a higher share of the sums recovered to offset this increased risk, in some cases funding may become unavailable. A balance must be struck between the public interest in ensuring effective access to justice, and the interests of the defendants.</i></p>	<p>As noted in our comments to paragraph 5.3, facilitating affordable premiums and financing for disbursements is arguably key to ensuring that SMEs and consumers have the means to privately enforce their competition law rights.</p> <p>We agree that potential liability for an opponent's costs if the case is lost is a key determinant in the supply of funding. To improve on the current position, some action is therefore necessary to reduce the liability of professional funders.</p> <p>It is worth bearing in mind that claims involving competition law often depend on complex factual and/or economic analysis, which may result in significant costs for experts. This may therefore create an additional risk factor for professional funders, against which an additional reduction of costs liability may be required.</p>
<b>Conditional fees: percentage increases</b>		
5.6	<p><i>Another key issue is whether the currently permitted percentage increase on normal fees is appropriate in all competition cases. Under a conditional fee agreement, solicitors and counsel may agree to receive no payment or less than normal payment if the case is lost but normal or higher than normal payment if the case is won. Currently, the percentage increase on the normal fees if the case is won can be no more than 100 per cent. Although this may be sufficient for the purposes of follow-on competition actions (or actions brought following the submission of a leniency application in, for example, the US), it may not be a sufficient incentive for lawyers to take well-founded, standalone cases.</i></p>	<p>It is important not to underestimate the power of financial incentives in encouraging lawyers to actively seek out cases (especially non-straightforward cases) and to take on the risks of bringing them. Setting the percentage increase at 100% (applicable to all conditional fee arrangements and not just those related to competition law claims) is an arbitrary setting of reward for increased risk. Such increased risk may exist not only in relation to stand-alone actions, but also, in specific circumstances, in relation to follow-on actions where</p>

		<p>there may be hurdles in establishing loss.</p> <p>There are several reasons for allowing a higher percentage increase than 100% for competition law claims than for other claim types. These reasons include the fact that:</p> <ul style="list-style-type: none"> <li>- current financial incentives have not been sufficient to facilitate significant levels of private enforcement of competition law rights amongst SMEs;</li> <li>- it is vitally important, from the perspective of competition law enforcement, to establish an effective claimant Bar. The OFT's Competition Prioritisation Framework, acknowledging that the OFT's resources are not infinite, means that many businesses may only have the courts to ensure redress for infringements of competition law;</li> <li>- claims involving competition law often depend on complex factual and/or economic analysis, introducing additional risk for lawyers.</li> </ul>
5.9	<p><i>One additional issue is whether the court should exercise this power at the beginning or at the end of the proceedings. Where the decision as to whether to 'approve' the percentage increase agreed between the lawyer and the client is made at the start of the proceedings, the court could take into account the size and complexity of the litigation, the level of risk and public policy considerations, among other things. This option would give lawyers and parties certainty at the beginning of the proceedings (or, possibly, even before proceedings are commenced). Where the percentage increase is determined at the end of the</i></p>	<p>At this initial stage in the development of private enforcement of competition law, the greater the certainty for potential claimants the better. The court should therefore exercise its power at the beginning of proceedings.</p>

	<i>proceedings, the court could also take into account the quality of the work done, and (possibly) the relationship between the fees and the amount of damages recovered.</i>	
<b>Discretion as to costs and costs-capping</b>		
Section generally		As previously noted in our response, reform of the current rules on costs is arguably key to ensuring that consumers, SMEs and other claimants bring private actions not only for breaches of the Chapter I prohibition and Article 81(1) EC (where in due course there may be the incentive of double damages) but also breaches of the Chapter II prohibition and Article 82 EC (where no incentive of double damages has been proposed).
5.14	<i>In terms of timing, costs-capping orders should ideally be made at an early stage of the proceedings. If the claimant's lawyers are acting under a conditional fee agreement, the court could at that stage also prescribe the percentage increase recoverable from the other party. If the conditional fee agreement provides for a further percentage increase between the lawyer and the client, the court could rule on whether the additional percentage increase should be confirmed or reduced.</i>	At this initial stage in the development of competition litigation, the greater the certainty for potential claimants the better. We therefore agree that the court should exercise its power at the beginning of proceedings.
5.16	<i>There may be merit in codifying the criteria and the procedure for costs-capping orders, so as to provide greater guidance on the circumstances in which an order will be granted and the likely contents of any such order. However, it would be essential to retain flexibility and a wide discretion to tailor the order to the circumstances of individual cases.</i>	In line with the general certainty point, the greater the guidance for courts and parties the better. We agree that it is important to retain flexibility.

**Information asymmetry**

6.5

*English law already has wide disclosure provisions. The aim is to place all the relevant evidence before the court to enable it to do justice as between the parties. For this reason, information asymmetry does not appear to be as significant a problem in the UK as it may be in some other jurisdictions. In particular, in England and Wales:*

- there is provision for pre-action disclosure orders on the application of a prospective party against another prospective party*
- once litigation has commenced, the parties have a duty of disclosure of relevant documents on which each party intends to rely, together with documents which either adversely affect his own case, adversely affect another party's case or support another party's case (standard disclosure)*
- there is provision for third party (or 'non-party') disclosure once litigation is under way. This allows parties to the litigation to obtain evidence from third parties, and*
- courts have flexible powers to ensure the adequate protection of confidential information.*

We agree that information asymmetry is less of a problem in England & Wales than for other jurisdictions. We consider that the court rules as they currently stand are adequate.

**Status of the other decisions of other EU NCAs**

6.12	<p><i>Public enforcement action for breaches of Articles 81 and 82 may also be taken by another NCA in the EU. Decisions made by these bodies are not, however, binding on UK courts. An extension of the provisions relating to the binding effect of NCA decisions would assist in further promoting private actions, by providing increased legal certainty and saving costs. It would also help to provide a level playing field - it would put UK consumers harmed by multi-jurisdictional anti-competitive behaviour ultimately condemned by a foreign NCA (as a result of, for example, case allocation within the ECN) on a more equal footing with (i) consumers harmed in a jurisdiction where the NCA has taken a decision against the multi-jurisdictional practice if the decision is binding on the courts in that jurisdiction, and (ii) consumers harmed in the UK by a similar practice in respect of which a UK NCA has taken a decision.</i></p>	<p>This seems a sensible proposal. Further, in line with <i>Provimi v Aventis (and others)</i><sup>1</sup>, which potentially opens the door to claims in English courts where losses have been suffered (and the E.C. competition law infringements have taken place) in other Member States, it would further facilitate the private enforcement of E.C. competition law rights in English courts.</p>
<b>Reciprocal alignment</b>		
6.17	<p><i>The second option would involve making decisions by NCAs binding in other Member States based on the principle of reciprocity. In order for a decision in State A to be binding in State B, two pre-conditions would have to be fulfilled: (i) decisions of the NCA in State A are binding on the courts of State A, and (ii) decisions of the NCA in State B are binding in State B. This option would be more respectful of national law as the choice as to the effects of the decision would be left to the national legal system. This proposal also recognises that making decisions of NCAs binding could have further ramifications within a national legal system - for instance, a Member State might consider it necessary to adjust the standard of review applicable to decisions of the NCA or reconsider the</i></p>	<p>It would seem anomalous for an English court to be able to rely on an infringement decision of an NCA of another EU country when the courts of that same country could not rely on it. Accordingly, the reciprocal alignment approach would seem better suited.</p> <p>An alternative would of course be to provide that the decision of the NCA could be taken into account by the English court without being binding, but this is not significantly different from the current position.</p>

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<sup>1</sup> [2003] EWHC 961 (Comm).

	<i>relationship between public law and private law liabilities. On the other hand, this proposal would not provide for an EU-wide level playing field.</i>	We would prefer to see reciprocal alignment. This would facilitate to the greatest extent possible the private enforcement of competition law rights in English courts.
<b>Indirect purchaser standing and "passing on"</b>		
6.21	<i>For all of these reasons, any limitation on the standing of consumers and other end-users would not seem to be appropriate.</i>	We firmly agree with this approach. Prohibiting, by means of national legislation, actions from end-users would arguably breach the E.C. law principle of "effectiveness". It would render ineffective the ability of parties subject to a breach of Article 81EC and 82EC to enforce their directly effective Community law rights in the courts.
6.22	<i>It is, however, important that 'passing-on' does not become a powerful shield for defendants to escape liability and, as a result, a disincentive for direct or indirect purchasers to bring an action. To this end, we propose the following model as a simplification and refinement of the model suggested in our response to the Green Paper. The model relies on three simple principles: (i) all persons harmed by cartels and other anti-competitive practices should have standing to bring an action, (ii) the defendant should only be liable for the loss he (individually or jointly with others) caused to each and every person who has suffered loss, and (iii) the burden of proof in respect of 'passing-on' should always lie with the defendant. Under this model, the claimant must prove that he has suffered loss. It is open to the defendant, however, to prove that the claimant mitigated the loss by passing on the whole or part of the overcharge to downstream purchasers.</i>	We agree with the three principles of the OFT's model. It is important that claimants are required to prove the loss they have suffered. Having the defendant face the burden of proof in establishing that losses have been passed-on represents a proportionate reduction in one of the obstacles to bringing claims.
<b>Applicable law</b>		

6.26	<p><i>Any rule applicable to cross-border competition claims must deal fairly with a complex situation. We are concerned to achieve predictability, fairness to the parties, and consistency and efficiency in adjudication of cross-border disputes while having due regard to national interests. It may therefore be appropriate to provide that, in cases where the restriction of competition affects, or is likely to affect, the market in more than one country, the person seeking compensation for damage who brings an action in the court of the domicile of (one of) the defendant(s), may instead choose to base his claim on the law of the court seised.</i></p>	<p>Such provisions would have to be reconciled with existing rules on conflict of laws. We are not clear how this could be done satisfactorily. The current rules on conflict of laws appear satisfactory. It may be better to monitor the situation to assess whether further specific action is required.</p>
<p><b>Pre-action protocol for competition claims in England &amp; Wales</b></p>		
7.6	<p><i>There is currently no pre-action protocol applicable to competition claims. We note that the Civil Justice Council is currently consulting on a consolidated pre-action protocol in England and Wales. If such a consolidated pre-action protocol is adopted, it would apply to competition cases. It may then be that, in the light of experience, it would be appropriate to introduce a specific annex for competition cases, alongside the annexes envisaged for other types of claim.</i></p>	<p>We agree that it is sensible to have a pre-action protocol covering claims involving competition law. As the problem of information asymmetry is particularly acute for claimants until disclosure, there would appear to be strong arguments for creating pre-action provisions on disclosure (to be contained in the referred-to competition annex to the consolidated pre-action protocol).</p>
<p><b>Competition Ombudsman</b></p>		
7.9	<p><i>We consider that this option is worthwhile exploring, but question whether there is a need or demand for such a scheme at a stage when private actions are still developing. If the general consensus is that this would be a viable proposal, the precise functioning of the scheme (including its interface with the OFT and public enforcement more generally, and how it would be funded) would need to be considered further, based on experience of other Ombudsman schemes in the UK</i></p>	<p>Our understanding is that the ombudsman scheme would be aimed at consumers rather than businesses and would facilitate informal resolution of their disputes with businesses. It would therefore be separate from the court process.</p> <p>The scheme may have merit and may benefit consumers but</p>

	<i>and elsewhere.</i>	the devil will lie in the detail of how it is funded and how it operates. Such a scheme seems unlikely to provide any benefit to SMEs and would add an extra layer of proceedings.
<b>Liability for damages and contribution</b>		
7.18	<i>We put forward two options for consideration. The first is the complete removal of joint and several liability for the immunity recipient. We consider that, in order to strike a proper balance between the public and private interests involved, it may be appropriate only for the immunity recipient to benefit from the removal of joint and several liability. The position of other leniency recipients would be unaffected. The second would be to allow claimants to bring an action against an immunity recipient under normal principles of joint and several liability, whilst empowering the court to allow the immunity recipient, in turn, to seek contributions of up to 100 per cent from non-leniency recipients.</i>	<p>An important component of the leniency regime is the certainty for applicants of the benefits of applying for leniency (immunity from, or a reduction in, penalties which otherwise be levied).</p> <p>In an enforcement environment which envisages private actions, and defendant liability for damages potentially in excess of fines levied, it seems essential that leniency applicants must have some incentive relevant to private actions, i.e. some reduction in their liability for damages.</p> <p>The proposal in paragraph 7.19 would tend to lack certainty for applicants. The proposal in paragraph 7.21 below seems a sensible compromise between public and private interests whilst ensuring the principle of effectiveness.</p>
<b>Possible redress in the context of the OFT's administrative settlement of cases</b>		
7.26	<i>Each school agreed to pay a penalty which was substantially lower than the penalty which would otherwise have been imposed on it. Under the terms of the settlement, the schools admitted their participation in the exchange of the information about intended fee levels and that this amounted to an infringement of UK competition law. The schools also agreed to limit their representations on the</i>	We consider that it is important not to mix the role of the courts and the role of national competition authorities such as the OFT. The courts provide a mechanism to claim damages for loss suffered and have detailed procedural rules and case law for doing so.

	<i>OFT's statement of objections, addressing only material factual inaccuracies.</i>	Any OFT involvement in negotiating redress has the potential to introduce an extra layer of administrative complexity into the process of obtaining redress. Such involvement is also unlikely to be able to appropriately factor in the many legal principles relevant to establishing and measuring redress, e.g. whether the loss has been passed on, the extent to which it has been mitigated, whether all, or only some of the loss, has been caused by the competition law infringement.
<b>Status of OFT decisions and guidance</b>		
8.6	<i>The rationale for the application of section 60(3) of the CA98 to guidelines and decisions of the Commission also applies to guidelines and decisions of the OFT and, where appropriate, other UK NCAs. We would therefore suggest that a provision should be introduced into the CA98 requiring the courts to 'have regard' to UK NCAs' decisions and guidelines when determining CA98 issues to ensure consistent and clear development of competition policy before UK courts and tribunals. The OFT interprets 'have regard to' to mean 'give serious consideration to' - 'have regard to' does not mean that the court is bound.</i>	This seems a sensible proposal.
<b>Miscellaneous comments</b>		
		The introduction of the OFT's Competition Prioritisation Criteria (acknowledging that the OFT's resources are not infinite) means that many businesses will only have court actions as a means to enforce their competition law rights. It is therefore vital that private enforcement is a success and available to consumers and SMEs.

		<p>Bearing this in mind and that no-one can predict whether the reforms will work in the manner intended, the OFT should consider conducting a review as to their effectiveness, say, eighteen months to two years after their introduction. This would allow for any further necessary reform.</p>
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