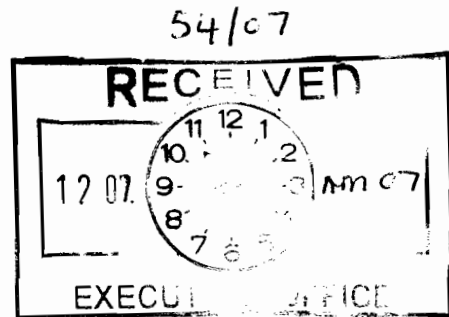




The Honourable Lord Hodge

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Private Actions 5C/053
Office of Fair Trading
Fleetbank House
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London
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10 July 2007

Dear Sir or Madam,

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

I refer to your discussion paper and apologise for the delay in responding as a result of pressure of work. I make this response as a judge of the Court of Session in Scotland but have not consulted my colleagues on it. Nevertheless, from discussions which I and several of my colleagues have had with the DTI in relation to representative actions in intellectual property cases, I am confident that at least several of my colleagues will have similar views to those which I express in this letter.

General

I have no difficulty with the idea of encouraging private actions to enforce competition rules, but I am concerned that the discussion paper does not take account of the real possibility that commercial organisations may use such actions, which may not be well-founded, as a weapon against commercial rivals. As a result, if the rules are skewed in favour of the claimant (or, in Scotland, the pursuer) at the expense of the defendant (or defender) injustice may result. The discussion paper appears to assume that competition actions will generally be well-founded in fact or law. That is not necessarily the case. Accordingly it is necessary to have safeguards to protect the interests of defendants (or defenders) who are sued in actions which turn out to be misconceived.

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I am also concerned that the use of private representative actions on behalf of consumers is an unprincipled way of enforcing a public policy, if the actions involve seeking damages on behalf of persons who have not claimed them and to whom any sums recovered will not be paid.

Representative actions

Representative actions have a role to play in prohibiting by injunction or interdict anti-competitive practices. In such actions the claimants (pursuers) would have a shared interest in stopping the illegal activity. Where however claims are made for damages, the use of representative actions becomes much more complex and there is a risk that what is designed to assist claimants (pursuers) would risk exposing them to unnecessarily complex and expensive litigation. The complications of such actions have to be considered as well as the possible economies of scale and the former may wipe out any gain from the latter. A defendant (defender) may have rights of set off (in Scotland, compensation of debts) against some of the claimants (pursuers) but not others. There may be problems in how the action will be funded by the represented parties and who will be responsible for the defendant's (defender's) costs or expenses if the action should fail.

If representative bodies were empowered to raise actions on behalf of consumers or businesses, there would be no great complications if all they sought were to prevent continued infringement of competition law. But the pursuit of damages by such bodies could cause problems unless one were to adopt the unprincipled approach of allowing a representative body to recover damages in a private action for a theoretical loss which could not be shown to have been incurred by any particular business or consumer. If claims are to be pursued to achieve compliance with competition law for the benefit of consumers at large, it appears to me that that is properly the role of a public authority which should have power to make the offending organisation disgorge its profits from infringements of competition law, rather than a private claim by a representative body on behalf of consumers who have not authorised an action in their names. The methods for calculation of damages referred to in paragraph 4.28 and the cy pres fund management in paragraph 4.37 to my mind demonstrate that what we are dealing with is not in reality a private claim but the surrogate of public enforcement of competition law.

Costs and funding arrangements

Costs of litigation have an adverse effect on access to justice. But that undoubted truth does not justify the state in adopting schemes which penalise defendants (defenders) who may have good defences to claims which are pursued against them, either by forcing them to settle claims for fear of being burdened with enhanced expenses if they were to lose their case, or by depriving them of or restricting their right to recover costs in the event that they succeed in their defence. Thus if

conditional fees are to be expanded, the court should control the proportion of any percentage increase which might be recovered from the losing party. However I find it hard to envisage how the court could make reliable judgements of the sort suggested in paragraph 5.9 at an early stage in a litigation. In addition it should be noted that as yet Scottish courts do not have power to make cost-capping orders.

Evidential issues and consistency of policy

To protect defendants (defenders) against injustice, the Scottish courts would have to have significantly enhanced case management powers in the field of competition law, including the ability to strike out claims and to control the recovery of documents. The latter is governed by rules which are quite different from the rules of discovery in England and Wales.

In order to promote consistency in competition law, I see force in the idea of providing that the courts should have regard to decisions and guidelines by EU and UK NCAs but I do not favour making such decisions binding. Given the different degrees of development of the judicial systems and competition systems of member states within the EU, including the recent accession states, I consider that there would need to be considerable further development of mutual confidence before it would be safe to contemplate making decisions binding on the UK courts.

If the OFT seeks to be kept informed of private actions which are principally concerned with competition law in Scotland, this may be achieved by the court issuing a practice note. Either a practice note or an alteration to our rules of court would provide a clear procedure for OFT intervening in such cases.

I hope that you will not find these comments too negative. They are motivated by the consideration that it is the task of the judiciary to ensure that litigation is conducted fairly in the interests of all parties to an action.

I am copying this letter to the Lord President of the Court of Session.

Yours faithfully,



Patrick S. Hodge

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