

Reed Smith Richards Butler's Submission on

OFT Discussion Paper on Private Actions

1. Collective Actions

1.1 Bodies designated as representative bodies under section 47B Competition Act 1998 should be able to bring stand alone actions. There seems to be little justification in limiting these bodies to follow-on actions only.

1.2 We do not see a need for expanding further current provisions allowing for representative actions to cover business groups. Representative actions already exist and have been used in competition cases.

1.3 We are in favour of 'representative' but not 'class' actions. Requiring a group to be determined before a claim is brought is likely to impose a degree of pre-testing of the claim, as parties have to make a conscious decision to take part in the litigation.

1.4 Allowing 'class actions' to be launched before claimants have been identified is likely to encourage speculative litigation and the litigation culture the OFT states it wants to avoid.

2. Conditional Fees / Costs

2.1 We are not in favour of increasing the 'Conditional Fee' uplift limit to more than 100%. Such an increase is likely to lead to significant pressure on defendants to settle weak claims to ensure that they are not exposed to the risk

of disproportionately high costs awards (and that they do not have to make allowances for this eventuality in their financial statements).

2.2 We would welcome clear / codified guidance on the use of ex ante cost-capping orders and suggest that this could be achieved by a further practice direction to Part 3 of the CPR.

2.3 We suggest that this be accompanied by guidance as to the use of the court's case management powers in competition cases under CPR rule 3.1.

2.4 We would welcome research into the effect that cost capping orders have on litigation.

3. **Mutual recognition Decisions by EU National Competition Authorities (NCAs)**

3.1 We consider that an infringement decision by an NCA should be binding (as soon as all appeal avenues have been exhausted or the time limits expired), as to the facts and parties, on the courts and national authorities of other Member States to ensure consistency of decision-making and a genuine system of mutual recognition¹. If a party wishes to challenge these findings, it is open to it to request that a court makes an Article 234 EC reference to the European Court of Justice.

3.2 Both national courts and NCAs will consider the impact on their domestic markets when applying Article 81 / 82 EC; therefore they are unlikely to consider the same factual matrix as another competition authority, so the

¹ In the same way as the House of Lords stated that EC Commission decisions are binding on UK courts in *Inntrepreneur Pub Company (CPC) & Ors v. Crehan* [2006] UKHL 38 (19 July 2006)

degree to which one NCA's decisions will bind another authority is likely to be limited.

4. **Passing on**

4.1 In our view it should be for any claimant to prove his loss and for the defendant to rebut this; 'passing on' is another form of defence and therefore it should be for the defendant to make it out.

5. **Pre Action: Information Exchange / Practice Direction**

5.1 We consider there to be merit in having a competition pre-action protocol to encourage exchange of information and early settlement of claims. These provisions should be backed by potential costs sanctions for parties that do not follow these directions, as is the case with other pre-action protocols (CPR rule 44.3(1) (a)).

5.2 Courts should be encouraged to use the wide ranging case management powers provided for in CPR rule 3.1(2)(m) to ensure that competition cases do not become unduly lengthy.

6. **Competition Ombudsman**

6.1 We do not favour the establishment of a Competition Ombudsman. Competition disputes typically involve complex factual disputes that do not lend themselves to the relative informality of an Ombudsman procedure.

6.2 It is likely that a mandatory Ombudsman procedure would further extend the wait for certainty in competition related cases, as parties unsuccessful before

the Ombudsman would, in all likelihood, then choose to pursue the action in court.

6.3 We suggest parties should be encouraged to settle cases before issuing competition related claims and to give serious consideration to alternative dispute resolution. We believe these provisions should be included in a competition pre-action protocol and backed by potential costs sanctions (as is the case with existing pre-action protocols).

6.4 We note that a competition Ombudsman is likely to overlap with other sectoral Ombudsmen. In any event, we suggest that sectoral Ombudsmen, such as the Financial Services Ombudsman, receive training in competition law so they are able to identify and consider competition related issues that may arise in cases they consider.

7. **Leniency**

7.1 We consider that it is important that the leniency regime is protected, therefore documents submitted to the OFT as part of a leniency application should be shielded from third party disclosure. If third parties were able to request the disclosure of these documents the attractiveness of making leniency applications would be likely to be significantly undermined.

7.2 We support the removal of joint and several liability for successful full leniency applicants, this would provide a greater incentive for leniency applications. This would reflect the US Antitrust Criminal Penalty Enhancement and Reform Act 2004, which allows successful leniency applicants to avoid liability for treble damages.

8. **Guidance on Private Actions**

8.1 We would welcome the OFT making available guidance to business on the scope of private competition law actions and options for settlement.

9. **Guidance for Courts**

9.1 We consider that courts in the UK should “have regard” to the decisions of the UK competition authorities and suggest that the most efficient way to achieve this is to amend Section 60 (3) Competition Act 1998 to include “UK competition authorities”.

10. **Limitation Periods**

10.1 In cases of follow-on actions, the limitation period should not start to run until the highest court or the court of last instance has decided on the issue of infringement or criminal liability, where no valid appeal to a higher court is pending or possible.²

² In the US the limitation periods for follow-on antitrust claims are suspended or ‘tolled’ until one year after a final civil or criminal decision has been made (Revised Code of Washington) 19.120.100 .