



**SIDLEY AUSTIN LLP RESPONSE TO THE OFFICE OF
FAIR TRADING'S DISCUSSION PAPER**

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

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INTRODUCTION

Sidley Austin LLP (“Sidley”) welcomes the opportunity to provide comments on the Discussion paper on private actions in competition law (“Discussion Paper”) published by the OFT in April 2007. Following some introductory remarks on the underlying principles that we believe should guide any reform in this area, our response focuses on a number of the OFT's key proposals, including representative actions, costs, evidential issues, and contribution. The authors of this response – Stephen Kinsella OBE (of Sidley’s Brussels office) and David Went (of Sidley’s London office) – would be pleased to discuss its contents with the OFT over the coming months and would be delighted to attend any future meeting at which the OFT discusses its proposals more widely.

OVERALL APPROACH

THE CURRENT SITUATION

The Discussion Paper acknowledges that “[m]ost of the main structural and legal elements for effective private actions in competition law are already in place in the UK.”¹ We believe that this is a crucial fact that should guide the OFT when considering and deciding upon any changes to the existing regime aimed at encouraging greater use of private competition law enforcement. The Competition Act 1998 and the Enterprise Act 2002 introduced significant changes to the UK system comparatively recently, and it is therefore understandable that private enforcement of competition law violations has not yet become more widespread. Moreover, while we can understand the OFT's reasons for seeking to facilitate more private actions (i.e., to make redress for businesses and consumers more effective and to complement the public enforcement of competition law), we believe that the perhaps slower than anticipated pace of progress in this area does not automatically militate in favour of wholesale and instant reform.

RECENT DEVELOPMENTS

Since the enactment of the Competition Act 1998 and the Enterprise Act 2002, the UK has witnessed important developments with respect to the private enforcement of competition law infringements. First, a number of companies that have suffered at the hands of cartels have taken advantage of the possibility of bringing follow-on damages actions before the Competition Appeals Tribunal (“CAT”). Second, as is generally acknowledged, competition law infringement proceedings involving not insignificant sums have been settled even before reaching court. Third, in March 2007, the consumer organisation Which? brought the first follow-on representative damages action before the CAT in relation to the replica football kit cartel.² Just as the OFT has been cautious in choosing those first cases in which to exercise its criminal powers, so has Which? in selecting its first representative action (not least presumably so as to give it the greatest chance of a successful outcome).

While the follow-on actions brought before the CAT have to date settled before reaching judgment and the replica football kit case is in its early stages, it is expected that, in the near future and without any

¹ Para. 2.5, the Discussion Paper.

² *The Consumers Association v JJB Sports plc* – Case 1078/7/9/07.

change to the rules, one or more private actions will be pursued until final judgment. Any judgment – whether in relation to a "direct" or representative action – will likely help determine some of the outstanding legal and procedural questions that may have deterred victims of cartels from bringing cases before the UK courts to date. As cases progress to judgment and more information enters the public domain as a result, we would anticipate greater recourse to the private enforcement of competition law infringements without the need for further action on the part of the OFT.

THE DANGERS OF A LITIGATION CULTURE

The OFT recognises in the Discussion Paper that guarding against the development of an unchecked litigation culture is important to the UK economy as a whole. In addition to the factors highlighted by the OFT, commentators have also suggested that the recent growth in foreign companies choosing to list in London rather than New York reflects in part the attractiveness of the UK's regulatory and legal regimes as compared with the US (including the costs imposed on businesses by the US litigation culture).³ We believe that the OFT should be especially cautious in expanding the scope for antitrust litigation at a time when the US Supreme Court appears to be raising the bar to antitrust litigation.⁴ Most recently in *Bell Atlantic Corp. v. Twombly*, a judgment handed down in May this year, the Supreme Court held that plaintiffs are required to plead facts that support a plausible theory of harm.⁵ This judgment refers to "*the problem of discovery abuse*" imposing a huge financial burden on innocent defendants and categorises the defence of private antitrust suits as "*a sprawling costly and hugely time-consuming undertaking*."

In proposing any reforms, the OFT should also be sensitive to the risks not only within the competition law sphere, but also in other areas of the law. Certain of the Discussion Paper's proposals (including, for example, conditional fees, costs-capping, and opt-out stand-alone actions by representative bodies) risk

³ See, e.g., the conclusions of the January 2007 report commissioned by US Senator Charles E. Schumer and New York Mayor Michael R. Bloomberg and prepared by McKinsey & Co entitled "Sustaining New York's and the US' Global Financial Services Leadership" (available at: http://www.senate.gov/~schumer/SchumerWebsite/pressroom/special_reports/2007/NY_REPORT%20FINAL.pdf). One of the main conclusions of this report, which was commissioned as a result of a perception that New York was losing ground to London in the battle to be the world's leading financial services market, was summarised by Senator Schumer and Mayor Bloomberg as follows: "*the legal environments in other nations, including Great Britain, far more effectively discourage frivolous litigation. While nobody should attempt to discourage suits with merit, the prevalence of meritless securities lawsuits and settlements in the U.S. has driven up the apparent and actual cost of business – and driven away potential investors.*" See also *The spectre of intrusive regulation*, Samuel Brittan, The Financial Times, 18 February 2005: "*It is often rightly said that in the US the litigation culture has similar effects to the legislative overload in Europe.*"

⁴ The Supreme Court has issued five substantive antitrust decisions over the past year and a half, all of which will likely make it harder for plaintiffs to bring antitrust actions. For a commentary, see for example *High Court Raises Bar On Antitrust Lawsuits*, Wall Street Journal, 22 May 2007, available at <http://online.wsj.com/article/SB117975608272309469.html>.

⁵ Judgment of 21 May 2007, available at <http://www.supremecourtus.gov/opinions/06pdf/05-1126.pdf>. The Court found in particular that a case brought under section 1 of the Sherman Act requires a complaint with sufficient factual matter which, when taken as true, suggests the conclusion of an agreement. An allegation of parallel conduct and a bare assertion of conspiracy will not suffice.

impacting on other forms of litigation in the UK. Other proposals (such as recognition of decisions by National Competition Authorities in other EU Member States, non-disclosure of leniency documents received by the OFT, and publication by the OFT of information and advice to consumers and businesses on how to bring a competition law damages action) are more naturally restricted to the competition law sphere.

REPRESENTATIVE ACTIONS

Pursuant to section 47B of the Competition Act 1998, specified bodies approved by the Secretary of State for Trade and Industry can bring follow-on actions before the CAT on behalf of groupings of named consumers. The Discussion Paper lays out various options for expanding the role of representative bodies in the private enforcement of competition law. The main proposals for discussion comprise: (1) entitling the courts, as well as the Secretary of State for Trade and Industry, to confer representative body status; (2) enabling representative bodies to bring stand-alone, as well as follow-on, actions; (3) providing that representative actions can be brought on behalf of consumers at large (as opposed to just groupings of named consumers); and (4) extending representative actions to businesses as well as consumers.

In reviewing these proposals, we would urge the OFT to have regard to the following considerations:

- It is only since June 2003 that representative bodies have been entitled to bring follow-on actions, while the first such case was launched in March this year. Accordingly, it appears premature to introduce further wide-ranging reforms before first allowing the existing regime a longer period to bed down and the first cases to be heard.
- The normal commercial risks and incentives associated with bringing, settling, and terminating litigation will not necessarily be felt by representative bodies. For example, in an opt-out regime, where representative bodies would be bringing actions on behalf of consumers at large, the economies of scale achieved by the representative body could alter the normal balance of power in settlement discussions, perhaps causing defendants to settle unmeritorious claims that they might normally expect to defeat. The Discussion Paper also considers reforms to the current rules for conditional fee arrangements and the introduction of cost-capping measures. Again, these measures could alter litigation strategies and lead, perhaps, to the filing or pursuing of claims that might not ordinarily have been pursued. The OFT should not underestimate the impact the proposed reforms might have on the conduct of litigation.
- The OFT should have regard to the dangers of opening the floodgates to unmeritorious claims from organisations purporting to represent classes of individuals or businesses but which do not in fact represent their genuine interests. At present, the conferral of representative body status is carefully controlled by the Secretary of State according to strict and detailed criteria.⁶ When discussing the

⁶ <http://www.dti.gov.uk/files/file11957.pdf>.

"*principal-agent problem*",⁷ the OFT considers that an important difference between class actions and representative actions is that representative bodies do not have a pecuniary interest in the outcome and act in a quasi public interest capacity.⁸ Having the Secretary of State confer representative body status helps ensure that such bodies act in the public interest. By contrast, allowing the courts to confer representative body status in relation to individual cases, particularly if coupled with an ability to bring stand-alone actions, would in our view risk compromising the public interest element and give rise to an increased risk of unmeritorious litigation (threatened and actual). A prospective representative body would not need to acquire representative body status before threatening litigation, while an application to a court to confer representative status would immediately require the defendant(s) to engage in litigation. It is not at all clear how the public interest would be better served by a potentially large number of representative bodies competing for the "business" of consumers. We would therefore favour retaining the current system requiring Secretary of State approval and not extending representative actions to stand-alone cases before the implications of the current regime are more fully known.

- On balance, we consider that representative actions should remain opt-in rather than being extended to consumers at large. We believe that at this stage the onus should be on consumers to take some step to come forward and participate in the action being brought. This is not least because of the "*principal-agent problem*" mentioned above and because we believe that individuals should ultimately decide whether they wish to become involved in litigation and who should represent them.⁹ If consideration were given to an opt-out system, it would be important for the determination of the scope of the consumer class to be subject to close judicial scrutiny – this would extend to overseeing the methods of notifying potential members.¹⁰

⁷ The concern here is that bringing an action on behalf of consumers at large, rather than named consumers, distances the relationship between the ultimate claimants and their representatives, and might therefore create more incentives for the action to be run in the interests of the representative body and its lawyers rather than in the interests of consumers who have suffered the harm.

⁸ Para. 4.34-4.35, the Discussion Paper.

⁹ See para. 4.22, the Discussion Paper.

¹⁰ It may be helpful to have regard to US and Canadian practice when considering the criteria to apply in determining the consumers who should be part of the representative action. When certifying class actions in the US, for example, it must be demonstrated that common questions of law or fact predominate over questions affecting individual members and that a class action is superior to other available methods for fair and efficient adjudication of the case. US courts inquire into (1) the interests of individual class members in controlling their own disputes; (2) the extent and nature of any litigation concerning the controversy already commenced by or against class members; (3) the desirability of concentrating the litigation of the individual's claims in one particular forum; and (4) the difficulties likely to be encountered in the management of the class actions, including calculation of damages on a class-wide basis. These issues are considered at the outset to enable the courts to determine for example whether conflicts of interest might exist among entities represented. There might also be a need to disaggregate a group of consumers in certain circumstances, for example where considering a greater number of claims would render the action too complex.

- While there appear to be good arguments for currently limiting representative actions to pursuing follow-on actions, retaining the Secretary of State's exclusive jurisdiction to confer representative body status, and requiring individuals to opt-in to the relevant action, we agree that there may be merit in allowing some businesses to take advantage of representative actions. As it does not appear that large businesses would likely be deterred from bringing individual antitrust actions (and claims, once filed by businesses, can in any event be aggregated under the Civil Procedure Rules), this reform should be aimed at small and medium sized businesses that would appear, as in the case of consumers, to face practical obstacles in bringing antitrust actions in the first place. The OFT might consider using the definition of small and medium sized businesses utilised under section 40 of the Competition Act 1998.

COSTS

The Discussion Paper considers that one of the major obstacles to bringing private actions in competition law is the cost of such actions and the difficulties and risks in funding them.¹¹ Among the options presented in the Discussion Paper is allowing uplifts of more than the current permitted ceiling of 100 per cent in conditional fee arrangements.

The Discussion Paper, while mentioning the complexity of competition law cases, does not present any particular evidence as to why it should be necessary to enable conditional fee uplifts exceeding 100 per cent in actions involving competition law. There are many other complex areas of law where an uplift of up to 100 per cent is currently deemed adequate. Indeed, in less complex cases, the courts already expect uplifts of considerably less than 100 per cent,¹² while an uplift approaching 100 per cent would be reserved for more complex cases. The rationale for the “normal” rule on non-inflated costs is to ensure an appropriate balance between the interests of the claimant and defendant, which we believe should be altered only in exceptional circumstances. It also bears emphasis that any amendments to the costs rules along the lines envisaged in the Discussion Paper would tend to increase the extent to which lawyers are “investors” in a case, which might potentially give rise to conflicts of interest. If, nonetheless, the OFT does contemplate advocating conditional fee uplifts of more than 100 per cent, we agree with the principle that the uplift above 100 per cent should be funded from damages and not by the defendant(s). Imposing too great a cost burden on defendants might place undue pressure on them to settle cases in inappropriate circumstances.

Also with respect to costs, we think that there is an important issue not dealt with in the Discussion Paper regarding successful defendants. In particular, it is not clear to what extent it is envisaged that the representative body itself would be liable for costs – or indeed whether the criteria for approving representative bodies would ensure that representative bodies have sufficient funds to pay costs – the

¹¹ Para. 5.1, the Discussion Paper.

¹² In *Callery v Gray* [2001] 3 All ER 833, the Court of Appeal held, for example, that a 20 per cent uplift is the maximum possible in road traffic accident claims. This judgment was subsequently upheld by the House of Lords: [2002] 3 All ER 417, HL.

extent to which individual consumers or businesses would be liable, or the mechanism by which successful defendants would obtain costs from individual consumers (particularly consumers at large in an opt-out system) and businesses. We believe that further thought should be given to this area to ensure that defendants are sufficiently protected with respect to costs, and that the fear of not recouping costs does not place pressure on defendants to settle claims that could and should have been defended.

EVIDENTIAL ISSUES

At paragraphs 6.6 to 6.10 of the Discussion Paper, the OFT discusses whether it might disclose information in its possession to claimants in private antitrust actions. As discussed at paragraph 7 of the Discussion Paper, it is essential that moves to increase the rate of private enforcement of competition law violations do not adversely impact on the OFT's public enforcement activities. The importance of this consideration is particularly evident when considering applications for the disclosure of documents that have been provided to the OFT with a view to obtaining immunity from, or reductions in, administrative fines. The most valuable recent addition to the OFT's armoury in its fight against cartels has been its leniency procedures that reward cartelists who blow the whistle on their fellow conspirators. Any move that compromises the effectiveness of the OFT's leniency regime must be avoided at all costs and the OFT must therefore vigorously oppose disclosure "fishing expeditions" of the type mentioned in paragraph 6.10.¹³

At paragraphs 6.18 to 6.23, the OFT discusses the availability of the "passing-on" defence to undertakings found to have participated in an infringement of competition law. The authors note the OFT's suggested model at paragraph 6.23 and believe that it represents a sensible way of tackling a difficult problem. At the same time, however, we consider that the availability of, and the mechanics of using, the passing-on defence may better be left to the courts than to regulatory intervention. The availability of the passing-on defence is relevant mostly to the assessment of damages, which is traditionally a role reserved to the courts. The fact that there is currently no UK precedent on this matter should not automatically require the OFT to propose legislative solutions. As a body whose views would tend to be well respected by the UK courts, the European Commission, and other national competition authorities, the OFT might perhaps instead consider commissioning a study – or conducting a separate consultation – on the exact effects of allowing, or disallowing, the passing on defence in competition law cases. At this stage, it might be preferable for the OFT to devote its efforts to informing the debate, rather than attempting to initiate a doubtlessly lengthy and complex legislative process.

EFFECTIVE CLAIMS RESOLUTION AND THE INTERFACE WITH PUBLIC ENFORCEMENT

At paragraphs 7.17 to 7.23 of the Discussion Paper, the OFT addresses the possibility of amending the UK's rules on contribution. In particular, one of the Discussion Paper's proposals is that defendants who have received immunity from administrative fines as a result of submitting information proving the

¹³ In this regard, we also note the comments of the OFT at paras. 7.11 to 7.13 and 7.15 and 7.16 of the Discussion Paper.

existence of a cartel should be able to count on their co-conspirators to pay their share of any damages award.¹⁴

One major downside to exposing a cartel to a regulator and applying for immunity from fines lies in the potential exposure to follow-on private damages actions. If, as expected, the take-up of follow-on damages actions increases and the availability of compensation is improved, this downside will weigh more heavily with potential leniency applicants. Accordingly, we consider that the OFT's proposed approach to contribution may have some merit. Any step that the OFT can take to increase the volume of immunity applications warrants serious consideration and moves to provide protection from exposure to follow-on damages actions may well be a significant factor in encouraging companies to seek immunity. We believe, however, that the OFT should be careful to ensure that immunity applicants are not over-compensated. The entities in question will have participated in a cartel and will, presumably, have profited from such participation.

CLOSING COMMENTS

The authors welcome the OFT's initiative in putting forward the Discussion Paper and commend the OFT for ensuring that the European debate on how better to compensate victims of competition law infringements is being led out of the UK. As mentioned above, the authors are grateful for the opportunity to provide comments on the Discussion Paper and would be keen to attend any future consultation meetings concerning private antitrust actions.

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¹⁴ The OFT's proposal is that claimants could bring an action against an immunity recipient under normal principles of joint and several liability, while the court would be empowered to allow the immunity recipient, in turn, to seek contributions of up to 100 per cent from non-leniency recipients.

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