

**Response to the European  
Commission's White Paper,  
Damages actions for breach of  
the EC antitrust rules**

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OFT1006

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# CONTENTS

<i>Chapter</i>	<i>Page</i>
1 Introduction	4
2 Standing: indirect purchasers and collective redress	5
3 Binding effect of decisions adopted by EU National Competition Authorities	7
4 Damages	8
5 The passing-on of overcharges	9
6 Costs	11
7 Leniency	12

# 1 INTRODUCTION

- 1.1 This paper sets out the response of the Office of Fair Trading (OFT) to the Commission's White Paper, *Damages actions for breach of the EC antitrust rules* and the accompanying Commission Staff Working Paper.
- 1.2 The OFT welcomes the White Paper and broadly supports the proposals it contains. The OFT has worked together with HM Government, the Commission and other Member States in promoting and advancing the discussions on damages actions and believes that the White Paper is an important step in this process.
- 1.3 The OFT has carried out substantial work in this area, both at EC and UK level. At EC level, the OFT responded to the Commission's earlier Green Paper with a detailed submission. At UK level, the OFT has significantly developed its policy on damages actions. In April 2007, it published a discussion paper on private actions, which was followed by a wide consultation procedure and a hearing which the Commission attended. The discussion paper and consultation responses are available at [http://www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/consultations/private](http://www.offt.gov.uk/advice_and_resources/resource_base/consultations/private). In November 2007, the OFT published a set of recommendations on private actions to HM Government. A copy of those recommendations is attached to this response and is also available at [http://www.offt.gov.uk/shared\\_offt/reports/comp\\_policy/oft916resp.pdf](http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft916resp.pdf).
- 1.4 Many of the proposals in the White Paper are similar to those advocated by the OFT in its recommendations. This response, therefore, focuses on those points which the OFT considers would be most helpful in advancing the discussions at this stage.

## 2 STANDING: INDIRECT PURCHASERS AND COLLECTIVE REDRESS

- 2.1 The OFT has recommended that standalone and follow-on representative actions should be available on behalf of (i) named consumers and businesses and (ii) consumers and businesses at large. In the White Paper, the Commission proposes the availability of *'representative actions, which are brought by qualified entities, such as consumer associations, state bodies or trade associations, on behalf of identified or, in rather restricted cases, identifiable victims'*.<sup>1</sup> The OFT's understanding is that actions on behalf of identified victims would equate to actions on behalf of named consumers and businesses, and actions on behalf of identifiable victims would equate to actions on behalf of consumers and businesses at large.
- 2.2 In the Staff Working Paper, the Commission appears to consider that *ad hoc* designated entities should be able to bring actions only on behalf of their members (namely, identified victims). If the OFT's understanding of the position in the Staff Working Paper is correct, this limitation may be unnecessarily restrictive. In particular, if the ability to bring at large actions is restricted to previously designated entities in order to avoid speculative litigation, this concern may more appropriately be addressed by requiring courts to apply a set of pre-determined criteria when considering whether to allow an entity to bring an action on behalf of consumers or businesses at large.
- 2.3 The UK currently has a system in which representative actions may be brought by bodies that are designated by the Secretary of State under section 47B(9) of the Competition Act 1998. Only one body is currently designated and, in the 5 years since the legislation came into force, the designated body has brought only one action. Thus, the current UK approach based on prior designation has not resulted in a significant level of either applications for designations or of representative actions. As a result, the OFT recommended a less restrictive option whereby the court may give permission to representative bodies to bring both at large and named actions.

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<sup>1</sup> White Paper, at 2.1.

2.4 In relation to the distribution of damages, the Staff Working Paper states that *'where possible, it is preferable that the damages be used by the entity to directly compensate the harm suffered by all those represented in the action ... However, it may be necessary to reflect on the possibility that, exceptionally, the damages awarded to the representative entity are distributed to related entities or used for related purposes'*.<sup>2</sup> This is an important proposal, as in some cases distribution of damages to those harmed by the conduct may be impractical or too costly, particularly in cases of representative actions 'at large'.

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<sup>2</sup> Staff Working Paper, at paragraph 56.

### **3 BINDING EFFECT OF DECISIONS ADOPTED BY EU NATIONAL COMPETITION AUTHORITIES**

- 3.1 The OFT supports the Commission's proposal that a final decision by an EU National Competition Authority<sup>3</sup> or final judgment by a review court<sup>4</sup> on Article 81 or 82 EC should be accepted in every Member State as irrebuttable proof of the infringement in subsequent civil antitrust damages cases relating to the same practices and undertaking(s).
- 3.2 In its recommendations, the OFT took the view that this issue is most appropriately dealt with at EU level, so as to create a level playing field in the EU. Providing for a binding effect (rather than a merely rebuttable presumption) is important for increased certainty, reduced litigation costs and reduced burdens on the claimant.
- 3.3 At paragraph 162 of the Staff Working Paper, the Commission proposes that the binding effect of National Competition Authorities' decisions throughout the EU (within a Member State and between Member States) could be subject to a public policy/fair trial exception if Member States so elect. While the OFT does not object to this in principle, it considers that any such exception is likely to be infrequently applied.

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<sup>3</sup> A decision which has been accepted by the addressees (by virtue of their having refrained from appealing the decision) or which has been upheld upon appeal.

<sup>4</sup> A judgment by a court competent to review the decisions of an EU National Competition Authority under the laws of that authority's Member State.

## 4 DAMAGES

- 4.1 The White Paper proposes that the Commission codify the *acquis communautaire* on the definition of damages. Under this, damages are of a compensatory nature, with exemplary or punitive damages available if and to the extent that they are available under national law. In the UK, damages essentially fulfil a compensatory purpose but exemplary or aggravated damages may be awarded in certain circumstances.
- 4.2 The White Paper also proposes that the Commission will issue non-binding guidance on the calculation of damages. The OFT considers that such guidance would be helpful but is unlikely to address key problems relating to the calculation of damages in representative actions. In particular, express provision for the calculation of damages in the aggregate and/or on a restitutionary basis is essential for representative actions to work effectively. In such actions, the calculation of compensatory damages on an individual basis may be evidentially too complex or inefficient.
- 4.3 The OFT has recommended that courts have discretion to direct that, in appropriate cases, damages will be calculated on an aggregated basis or awarded on a restitutionary basis. This will be a key factor in securing the viability of representative actions, especially representative actions at large or those brought on behalf of a large number of businesses or consumers.

## 5 THE PASSING-ON OF OVERCHARGES

- 5.1 As set out in its recommendations, the OFT considers that the passing-on issue is best dealt with at EC level. In particular, inconsistent treatment of the passing-on issue at Member State level would undermine the effectiveness of damages actions regimes throughout the EU.
- 5.2 The White Paper makes two main proposals:
- The passing-on defence should be available to defendants to enable them to resist a claim for compensation of an overcharge where the claimant passed on that overcharge to a subsequent purchaser. This would prevent the unjust enrichment of purchasers who passed on the overcharge and would avoid multiple compensation by the defendant. The burden of proof should be imposed on the defendant and the standard of proof should not be less than the standard imposed on the claimant to prove the damage.
  - Indirect purchasers should be entitled to rely on a rebuttable presumption that the illegal overcharge was passed on to them in its entirety. This accords with the compensatory principle, which requires compensation for those who have suffered damage from an infringement and can show a sufficient causal link with the infringement (whether direct or indirect). Defendants would be able to provide evidence to rebut the presumption.
- 5.3 The Commission's proposals accord broadly with the OFT's views, as set out in its Response to the Commission's Green Paper and its own recommendations. However, the OFT considers that a system which is based on defendants bearing the burden of proving passing-on and on indirect purchasers benefiting from a presumption that overcharges have been passed on to them is a reasonable but second best solution arising out of the shortcomings of the current system, in particular the absence of a European-wide consolidation mechanism which, if it could be delivered, would be the best solution.
- 5.4 The White Paper recognises the limitations resulting from the lack of such a mechanism, stating that *'in the case of joint, parallel or consecutive actions brought by purchasers at different points in the distribution chain, national courts are encouraged to make full use of all*

*mechanisms at their disposal under national, Community and international law in order to avoid under- and over-compensation of the harm caused by an infringement of competition law'.<sup>5</sup>*

- 5.5 If there were an effective and widely-available method of consolidating cases, so that a defendant is likely to be faced with only one action on behalf of both direct and indirect purchasers, rather than multiple actions, there would be no need for the proposals as to burden of proof and presumption of passing-on. Once the overcharge had been proven, the defendant would be liable for damages arising out of that overcharge but the questions of how much of the overcharge was passed on to various levels in the distribution chain would be for the various claimants to resolve in apportioning the damages. Concerns relating to multiple compensation would not arise.
- 5.6 The OFT recognises that a pan-European consolidation mechanism may be difficult to devise and implement in the short term. In particular, the OFT considers that the 'Brussels I' Regulation<sup>6</sup> may not be well-suited to addressing all of the complexities and issues that may arise in this area. The Commission's proposals may, therefore, be the best way forward in the circumstances. However, the OFT would encourage the Commission to engage in a more detailed and substantive consideration of potential mechanisms for consolidation of cases and apportionment of damages among direct and indirect purchasers.

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<sup>5</sup> White Paper, at 2.6.

<sup>6</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16 January 2001, page 1.

## **6 COSTS**

- 6.1 The White Paper and Staff Working Paper recognise that the cost of bringing antitrust damages actions may operate as a significant disincentive for claimants. Again, this accords with the OFT's view as set out in its recommendations. The OFT considers that current mechanisms for funding actions, such as permitted percentage increases on lawyers' fees in the event of a successful claim, may not be sufficient to overcome the disincentives to take on well-founded, private competition law actions.
- 6.2 The Commission implicitly accepts, by not proposing taking any direct action in relation to costs, that mechanisms for funding damages actions and costs may be best dealt with at Member State level. Member States will clearly have to address the issue of funding arrangements and costs, as failure to do so will likely result in an appropriate level of damages actions (particularly representative actions) remaining no more than a theoretical possibility.
- 6.3 Nonetheless, the OFT considers that the guidance given by the Commission in the White Paper as to the types of mechanisms that Member States may implement in this area is helpful. Further work in this area by the Commission would clearly be beneficial. Such work could potentially result in Commission Recommendations on the measures that Member States should consider adopting (within the framework of their respective national legal systems) to address the barriers to effective redress for businesses and consumers that result from limitations on funding and rules on costs.

## 7 LENIENCY

- 7.1 The OFT supports the Commission's proposals regarding leniency. The effectiveness of the leniency programme is of paramount importance from a public interest viewpoint. It is an essential tool in the investigation of cartels. If undertakings are discouraged from applying for leniency due to the risk of private actions, it is likely that a smaller proportion of cartels will be uncovered. This, in turn, would reduce the scope for follow-on actions in cartel cases. The OFT is strongly of the view that it is in the public interest to safeguard the effectiveness of the leniency programme, and that changes to the private actions system must not jeopardise that aim. The OFT, therefore, supports the Commission's proposal that protection from disclosure should apply to all corporate statements submitted by all applicants for leniency in relation to a breach of Article 81 EC (also where national competition law is applied in parallel). The OFT has recommended that, in the UK, leniency documents<sup>7</sup> should be excluded from use in civil litigation also in cases where national competition law alone is applied.
- 7.2 The Commission puts forward for further consideration the possibility of limiting the civil liability of the immunity recipient to claims by his direct and indirect contractual partners. The OFT takes the view that limiting the liability of immunity recipients to the harm they caused to direct and indirect purchasers of their products would allay concerns that potential applicants for immunity may have about having to compensate the whole of the loss caused by the cartel. A maintenance of, or increase in, the level of leniency applications would promote detection of cartels and promote follow-on actions. The OFT takes the view that such a limitation should only apply to the immunity recipient, that is only to undertakings being granted immunity from fines.

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<sup>7</sup> In the OFT's understanding, the Commission's definition of corporate statements is broadly the same as the OFT's definition of leniency documents, that is documents that are created for the purpose of the leniency application.