

General Pre-Action Protocol and Practice Direction on Pre- Action Protocols

Response of the Office of Fair Trading

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OFT995

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1 INTRODUCTION

- 1.1 The Office of Fair Trading (OFT) welcomes the opportunity afforded by the Civil Justice Council to respond to its Consultation Paper. The OFT is the UK's competition and consumer authority. It is an independent body entrusted with a wide range of enforcement powers in competition and consumer law.¹ Our mission is to make markets work well for consumers. Our vision is for competitive, efficient, innovative markets, where standards of consumer care are high, consumers are empowered and confident about making choices and where businesses comply with competition and consumer laws but are not overburdened by regulation.
- 1.2 We adopt a market-informed approach with a focus on outcomes that support productivity growth and consumer and business welfare. We believe this approach is in the best interests of both businesses and consumers as well as to the benefit of the UK economy.
- 1.3 Through putting our vision into practice, we have experience of litigation in relation to competition and consumer law, as well as other fields such as judicial review. Where relevant we have made reference to the Civil Procedure Rules (CPR) and the current Protocols Practice Direction.

Competition law case work

- 1.4 Appeals on the merits against OFT decisions on infringements of the Competition Act 1998, or of non-infringement decisions, are brought by parties to the Competition Appeal Tribunal (CAT).² Applications for

¹ The OFT's constitution is set out in section 1 of and Schedule 1 to the Enterprise Act 2002. The OFT is a non-ministerial government department headed by a Chairman, Chief Executive and several executive and non-executive members (see Enterprise Act 2002 Sch. 1 paragraphs one and 5) and OFT Rules of Procedure www.offt.gov.uk/about/organisation/board/. Its statutory duties and powers are to be found in several statutes, including the Enterprise Act 2002, the Competition Act 1998, the Consumer Credit Act 1974 and the Estate Agents Act 1979, as well as several statutory instruments.

² Section 46 of the Competition Act 1998

judicial review of decisions relating to merger situations or market investigations are also heard before the CAT.³

- 1.5 The OFT is required to adhere to a statutory framework before issuing a decision. If there is a subsequent appeal against the decision there are also strict procedural rules governing litigation in the CAT which are set out in the Competition Appeal Tribunal Rules 2003 (CAT Rules)⁴ and the Competition Appeal Tribunal Guide to Proceedings (CAT Guide).⁵ In particular, Rule 3 of the CAT Guide notes that the:

'[CAT] rules are based on the same general philosophy as the CPR and pursue the same overriding objective of enabling the Tribunal to deal with cases justly, in particular by ensuring that the parties are on an equal footing, that expense is saved, and that appeals are dealt with expeditiously and fairly.'⁶

However, it is also noted that 'it should be borne in mind that the Tribunal's Rules are different in various respects. Parties should not assume that the CPR ... appl[ies] to particular procedural issues'.⁷

- 1.6 When dealing with appeals, the OFT therefore has primary recourse to the CAT Rules and the CAT Guide. Where necessary, reference is made to the CPR for guidance, but the Protocol Practice Direction is not directly relevant.

³ Sections 120 and 179 of the Enterprise Act 2002. A party is also able to lodge an application in the Administrative Court for a judicial review of an OFT decision.

⁴ SI 1372/2003 and The Competition Appeal Tribunal (Amendments and Communications Act Appeals) Rules 2004 SI 2068/2004

⁵ October 2006 – see www.catribunal.org.uk/rules/Rules.asp?Category=3

⁶ Rule 3.1

⁷ Rule 3.3. Rule 3.4 also sets out the main principles of the CAT Rules: (i) early disclosure in writing; (ii) active case management; (iii) strict timetables; (iv) effective fact finding procedures; (v) short and structured oral hearings.

Consumer law case work

- 1.7 At present the OFT's role in relation to consumer protection law covers a wide range of legislation including the Enterprise Act 2002 (EA02), the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCRs) and Estate Agents Act 1979. Part 8 of EA02 is an umbrella provision that provides a mechanism for the OFT to bring actions against traders for breach of other specified legislation such as UTCCRs. However, the OFT can also take action against a trader using the relevant legislation rather than through the EA02 process.
- 1.8 On 26 May 2008 the Consumer Protection from Unfair Trading Regulations 2008 (new regulations) will come into force. The effect of the new regulations will be to replace a considerable number of different pieces of consumer protection legislation with one cohesive set of rules.⁸ The civil provisions of the new regulations will be enforced through the existing procedure set out in Part 8 EA02. In order to assist the Civil Justice Council, an outline of the requirements placed upon the OFT by EA02 are set out below.
- 1.9 Part 8 EA02 provides the OFT with powers to obtain enforcement orders (injunctions) against traders that have engaged or are engaging in conduct which infringes domestic or EC consumer law (known as domestic and Community infringements).⁹
- 1.10 Before undertaking court action, the OFT is required (except in the case where an application for an enforcement order should be made without delay) to engage in appropriate consultation with the trader to achieve cessation of the infringement and ensure it is not repeated. This is likely to involve the exchange of information and documentation between the

⁸ www.offt.gov.uk/advice_and_resources/small_businesses/competing/protection

⁹ Section 217 EA02 and for further information about Part 8 EA02 generally see www.offt.gov.uk/shared_offt/business_leaflets/enterprise_act/oft512.pdf

OFT and the trader.¹⁰ Depending upon the circumstances of the case (and the detriment suffered by consumers) the OFT will consider whether it is necessary to seek an interim enforcement order or a final enforcement order and this will impact upon the minimum length of time the OFT should spend on the consultation period. In cases where only a final enforcement order is sought, then the minimum period allowed for consultation with the trader is 14 days.¹¹ For interim enforcement orders the minimum consultation period is seven days,¹² but for very urgent interim enforcement orders the consultation period can be dispensed with.¹³ However, cases where an application is required without a consultation period will be quite rare. In many cases, provided that a positive outcome appears possible, it is likely that the consultation period will be longer than the minimum requirement.

- 1.11 During the consultation process, the OFT can also consider whether to accept undertakings from a trader to not engage in the conduct which constitutes the infringement, in lieu of court proceedings and may publish the undertakings.¹⁴ If the trader subsequently breaches the undertakings, the OFT will commence a fresh period of consultation with the trader. However, given the previous breach of undertakings, the OFT is less likely to accept a further set of undertakings from the trader. Should an application for an enforcement order become necessary, any breach of the undertaking will be brought to the attention of the court.¹⁵

¹⁰ Section 214 EA02

¹¹ Section 214(4)(a) EA 02

¹² Section 214(4)(b) EA 02

¹³ Section 214(3) EA02

¹⁴ Section 219(5B) EA 02

¹⁵ Section 220 EA02

1.12 Once the consultation period has come to a close, the OFT will usually issue a letter before claim prior to issuing proceedings. However, due to the lengthy correspondence and negotiations that can sometimes occur during the consultation process and the fact that allegations and evidence in support will have already been set out, the length and detail of the letter before claim will vary.

Lord Chancellor's pledge on Alternative Dispute Resolution (ADR)

1.13 In March 2001 the then Lord Chancellor announced a new initiative by government to promote ADR in place of litigation, so that in future government departments will only go to court as a last resort.¹⁶ There were various elements to the pledge, but the most relevant to this consultation is that ADR will be considered and used in all suitable cases wherever the other party accepts it.

1.14 As a result of the pledge, whenever the OFT is faced with litigation it has to consider whether the matter is suitable for ADR and keep this decision under review throughout the life of any subsequent litigation.

Private actions in competition law: effective redress for consumers and business

1.15 In November 2007, the OFT published its recommendations to the Government on *Private actions in competition law: effective redress for consumers and business* (OFT Recommendations).¹⁷

1.16 The OFT Recommendations build upon a UK-wide consultation on the barriers to effective redress in competition cases (Discussion Paper).¹⁸

¹⁶ [nds.coi.gov.uk/Content/Detail.asp?ReleaseID=24434&NewsAreaID=2](https://www.nds.coi.gov.uk/Content/Detail.asp?ReleaseID=24434&NewsAreaID=2)

¹⁷ www.offt.gov.uk/shared_offt/reports/comp_policy/oft916resp.pdf

¹⁸ OFT's discussion paper *Private actions in competition law: effective redress for consumers and businesses* available at www.offt.gov.uk/advice_and_resources/publications/reports/competition-policy/oft916. The consultation responses are published at www.offt.gov.uk/advice_and_resources/resource_base/consultations/private

- 1.17 Paragraph 1.1 states that 'the purpose of the paper is to make recommendations to the UK Government as to the steps which, in the OFT's view, should be taken at the domestic level to improve the effectiveness of redress for those who have been harmed by breaches of competition law'. The same paragraph added that 'although the legal systems of England and Wales, Scotland and Northern Ireland are different in various respects, such that methods of implementation would vary by jurisdiction, the purpose and spirit of the recommendations are of general application'.
- 1.18 Paragraph 1.2 summarises the recommendations about actions by representative bodies, capping parties' costs liabilities, a litigation fund, a requirement for UK courts and tribunals to have regard to UK competition authorities' decisions and guidance, and powers to be conferred on the Secretary of State in respect of leniency documents and immunity recipients.
- 1.19 Paragraph 1.3 discusses the possible need for new or additional case management powers to minimise any risk of ill-founded litigation arising from such changes.
- 1.20 Paragraphs 11.7 – 11.11 comment on the desirability of a pre-action protocol for competition cases and acknowledge the importance of the Civil Justice Council's consultation on a consolidated pre-action protocol in England and Wales.
- 1.21 We now turn to the questions in the Consultation Paper and offer responses to the questions posed.

2 RESPONSE TO THE PROPOSALS

Overview

(1) Do you agree with the proposed structure of a shorter Practice Direction highlighting the court's case management powers and a General Pre-Action Protocol setting out the requirements on parties to a dispute? Please give reasons for your view?

2.1 The OFT is of the view that the proposed new structure of a shorter practice direction (New Practice Direction) highlighting the general points that are applicable to all the pre-action protocols and then a more detailed General Pre-Action Protocol (New Protocol) that applies as a default protocol where other pre-action protocols are not applicable would be very helpful. In particular, by placing the New Practice Direction under Part 3 of the CPR, it should give all of the pre-action protocols more prominence (particularly for those less familiar with the CPR). In addition, the New Protocol will make it clearer that there are now requirements specifically applicable for all other claims that do not fall within one of the other specialist pre-action protocols.

(2) Are there particular classes of cases or types of circumstances where the General Pre-Action Protocol should not apply? If so please specify.

2.2 Consumer law matters are governed by the CPR and the New Protocol will be applicable. As detailed above, various statutory requirements already govern the pre-action consultation process the OFT has to follow. The OFT would therefore encourage the Civil Justice Council to incorporate sufficient flexibility into the New Protocol for the current process of consultation followed by an appropriate letter before claim to be taken into account by the court when assessing compliance with the New Protocol.

2.3 As detailed in paragraph 1.5 above, before issuing a competition decision the OFT has to comply with the relevant statutory framework and any appeals are usually heard in the CAT. Such proceedings in the CAT are governed by the CAT Rules and the CAT Guide, with reference

to the CPR where appropriate. It is unlikely that the New Protocol will be deemed to be directly applicable given the detailed requirements already set out in the CAT Rules and CAT Guide.

- 2.4 The OFT's recommendations acknowledged that the Civil Justice Council had consulted on proposals to introduce a consolidated pre-action protocol in England and Wales, which if adopted, would apply to private competition actions.
- 2.5 It was suggested in the Discussion Paper that if a consolidated pre-action protocol were adopted, it might be appropriate to introduce a specific annex for private competition cases. The majority of the respondents to the Discussion Paper indicated that a specific annex would assist in clarifying procedure in the early stages of a claim when a claimant requires the most certainty and would correct any information asymmetry problems.
- 2.6 A small number of other respondents felt that a specific annex was not required as competition cases are very fact specific, so there may not be the necessary commonalities between cases.
- 2.7 The OFT notes that the New Protocol would be applicable to private competition cases. However, the OFT would suggest that the new Protocol be interpreted flexibly in such cases to take into account their complexity and the nature of the pre-action inquiries that are often required in these cases. Furthermore, the OFT suggests that the position be kept under review and, if appropriate, a private competition protocol be considered at a later stage.

Language

(3) Do you have any comments on the language used and the drafting of the revised Practice Direction and General Pre-Action Protocol? If so, please specify.

- 2.8 The OFT would welcome the proposed changes as it makes important issues clearer for everyone involved in the litigation process. In particular, it should be helpful in drawing the attention of litigants in person to key issues that they need to be aware of.

2.9 The only potential issue envisaged by the OFT is that the requirements and guidance do not become less clear or legally imprecise for the sake of simplicity of language, as this could cause additional confusion. For example 'issuing proceedings' is now called 'starting a court claim', but in other parts of the CPR where more specific details are given (for example Rule 7 CPR) 'starting proceedings' is used rather than 'court claim', so if reference is made to the more detailed elements of the CPR, it may raise questions as to why there are differences in terminology. Further, whilst a very basic guide to issues such as disclosure is given in the New Protocol, parties are likely to need to refer to the relevant detailed part of the CPR and as this contains more technical language, confusion may still occur.

Alternative Dispute Resolution (ADR)

(4) Do you agree with the approach taken to ADR in the General Pre-Action Protocol?

2.10 By including a section about ADR the Civil Justice Council is sending a clear signal that consideration of methods of settlement at an early stage is something that is strongly encouraged and non-consideration may incur adverse cost consequences.

2.11 Paragraph 6.4 of the New Protocol is particularly important as it makes the point that ADR is not something that is only considered once, but a continuing obligation. However, the Civil Justice Council may wish to re-consider the wording used and give clearer guidance as to what would be considered good practice. For example, whilst consideration of the possibility of ADR and settlement will be on-going, a proper review should really be carried out at key milestones, such as once the parties have filed their statement of case, following disclosure and when witness statements have been exchanged.

Steps to take before starting a court claim

(5) Do you agree with the required steps set out in the General Pre-Action Protocol, and in particular the approach taken to time limits? Please give reasons for your view.

- 2.12 The approach taken in the New Protocol is positive. It should be particularly helpful for litigants in person as it gives them a structure to work to and sets a general framework for all concerned.
- 2.13 As detailed in paragraphs 1.7 – 1.12 above, the OFT's consumer work follows a process that involves detailed consultation with traders to try to resolve matters before a letter before claim is sent. Our letters before claim are shaped by the consultation process and other considerations, such as whether parties have previously given undertakings to the OFT regarding such behaviour and if they have been breached. The result being that the remedy the OFT is seeking and the steps it considers necessary to take may vary from case to case.
- 2.14 As the OFT already has specific consultation requirements placed upon it and in some cases there may be a need to dispense with consultation, the OFT would wish for there to be flexibility in the interpretation of compliance with the New Protocol to take into account such specific statutory requirements and circumstances. This is because if there is a requirement to strictly comply with the New Protocol it may lead to an unnecessary duplication of work and in some cases increase the time that consumers are exposed to the trader's behaviour before an enforcement order is obtained (assuming the court finds in the OFT's favour).
- 2.15 It is noted that the New Protocol gives a general guide as to what is regarded as a reasonable period of time. It is noted that the time periods given run from the date of the letter before claim rather than receipt. Acknowledgement of receipt should be sent out within 14 days and full responses within a month unless particularly complex. This means that a full response is usually required to be sent out 14 days after the acknowledgement of service. Whilst it is desirable to provide a response as soon as possible, it may take two of the 14 days for a letter to simply reach the defendant. The acknowledgement of receipt will then have to be sent out and the matter investigated. Assessment of the claim will be carried out and a response drafted, but will probably have to be internally reviewed and approved. This whole process may be time

consuming and it may therefore be difficult for defendants to respond within the timeframe suggested.

- 2.16 It is acknowledged that the New Protocol does envisage it being possible to take longer than one month for defendants to respond but the description of the types of cases that may require a longer period of time is quite narrow and suggests a very specialist and/or complex case. It may therefore be appropriate to make it clear that some cases that are perceived to be less complex may nevertheless, take longer than one month, in order to manage expectations of parties, particularly litigants in person.

(6) Would it be helpful to include a 'model' letter (non-mandatory) before claim (for a standard consumer claim) as an annex to the General Pre-Action Protocol?

- 2.17 As previously noted, the OFT has statutory requirements it has to comply with before issuing a claim in consumer law matters and has developed its own precedents, to ensure all requirements are fulfilled. From the OFT's own perspective it would not benefit from a model letter being provided.
- 2.18 In relation to litigants in person, it is possible that a precedent may be useful in some circumstances, but in most cases it will still have to be modified in some way to fit the facts of the case. It may therefore be advisable to include reference to sources of further free relevant consumer advice, such as Citizens Advice or Consumer Direct, who could provide more specific templates that better meet the needs of the individual.

Debt claim requirement

(7) Do you agree that the General Pre-Action Protocol should include the additional requirements in simple debt claims?

- 2.19 The OFT believes that the additional requirements for simple debt actions would be useful as it will assist individuals with finding sources of help to deal with claims that they may not be able to pay. It should perhaps be noted that although in some instances a matter may be treated as a

debt action by a business, it actually relates to some underlying customer dispute. For example, a consumer may refuse to pay for some or all of the price for a service or good because of an issue such as the level of service received or a good being faulty, but the matter is not dealt with by the business and the non-payment is treated as a debt action instead. In those circumstances, it may be helpful to include a requirement that details are provided of someone the defendant can contact for further information about the claim or to discuss the matter if they genuinely contest the claim being made. In addition, it may also be helpful to include the details for Consumer Direct in the Annex so that individuals have a source where they can seek advice about consumer claims they may have.

Experts

(8) Do you agree with the approach taken to experts in the General Pre-Action Protocol? Please give reasons for your view.

- 2.20 The main function of the section covering the use of experts appears to be making litigants in person and those not familiar with the CPR aware of the key issues and directing them to more specific guidance and assistance in other parts of the CPR. However, it is important to ensure that the guidance given in this section is not too general, as this may give the misleading impression that it is not necessary to consult the other more specific guidance or is indeed contradictory.
- 2.21 For example paragraph 8.4 of the New Protocol deals with the parties seeking to agree whether to instruct an expert and it rightly encourages the use of a single joint expert or an agreed expert. However, it is not until paragraph 8.8 of the New Protocol that the potential for the parties to not agree on the nomination of a single joint expert is raised and there is no reference at all to the possibility of both parties instructing their own expert.
- 2.22 Whilst most competition matters are heard in the CAT and are therefore dealt with in accordance with the CAT Rules and CAT Guide, some private competition law matters are dealt with in the High Court and

would fall under the New Protocol. In those cases, there may be a requirement for detailed and complex economic advice, which could be highly contentious, therefore both parties may wish to have their own expert evidence. Equally, in some consumer law matters such as where claims are made as to the medical or therapeutic qualities of certain products, in such cases it is highly likely that both parties would request their own expert evidence. As the New Protocol will apply to all matters that do not fall under a specific protocol, it needs to be sufficiently flexible to not constrict the needs of more complex cases or mislead people who are less familiar with the CPR, as to all the options that are potentially available.

- 2.23 Paragraph 8.6 of the New Protocol requires that any expert report obtained before proceedings are issued should be provided to the defendant with the letter of claim, but envisages this is only likely to occur in exceptional cases. Whilst this may be the case for most types of claims, in private competition matters this may well become common practice as it is often necessary for the claimant to seek assistance with establishing whether a claim exists at the outset.
- 2.24 The intention behind requiring an expert report to be provided with a letter of claim is clearly to encourage parties to be as open as possible about their claim in order to try and facilitate an early resolution. It is noted that if the requirement to produce any experts' reports at that stage was mandatory, parties to private competition matters who obtain reports to understand the strength of their claim but do not intend to subsequently use the person as an expert witness, may have concerns. There is also no reference in the New Protocol to rights of privilege, which could mislead some parties.
- 2.25 Parties should not seek to conceal any element of their case and should always consider whether early resolution is possible. In the OFT's case its consultation letters and any subsequent letters before claim are open about the factual basis for its claims and provide relevant supporting documentary evidence. The New Protocol therefore needs to have flexibility to take into account specific circumstances so there is no

mandatory requirement to produce any reports obtained before issuing a letter before claim.

- 2.26 Paragraph 8.8 of the New Protocol is headed 'Instructing an expert after sending a letter before claim' but only really deals with the process for choosing an expert in circumstances where the parties cannot agree an appropriate single joint expert. This section gives no practical guidance on what should be contained in the actual instructions for an expert, the only assistance is in the guidance referred to in paragraph 81. This is likely to be one of the main concerns of users of the New Protocol and does not refer to the fact that in certain circumstances the instructions themselves may have to be disclosed.
- 2.27 Finally, whilst not strictly relevant to the issue of expert witnesses, it is noted that the New Protocol gives no guidance about use of witnesses of fact.

Limitation

(9) Do you agree that, where limitation is an issue, parties should be encouraged to agree not to take the 'time bar' defence?

- 2.28 The benefits of the proposed new system whereby defendants agree not to take the time bar defence for a specified period of time are clear. In many cases, parties are forced to issue claims in order to protect their position and then where appropriate seek a stay to try and resolve the matter by ADR. By the defendants agreeing not to take the time bar defence for a specified period of time, the parties can seek to resolve the matter amicably and if successful will have saved their own time and costs together the costs associated with time and costs. If the matter cannot be resolved, then the claim can still be subsequently issued providing it falls within the agreed period of time.
- 2.29 The following factors should however be taken into account by the Civil Justice Council. The defendant may only agree to not taking the time bar defence for a limited period of time, possibly to keep the pressure on the claimant to try to agree to a resolution. However, an agreement may not be reached within the time agreed, so the claimant may still have to

issue a protective claim before the expiry of this (newly agreed) time limit.

- 2.30 Secondly, the Civil Justice Council may consider giving more specific guidance to potential defendants (particularly litigants in person) as to the format of any agreement to not take the time bar defence. This is particularly important because potential defendants may be pressured into such an agreement, but do not understand what has been agreed. The effect may be that rather than waiving the right to the time bar defence for a limited period of time in order to facilitate settlement discussions, they actually waive the right indefinitely and lose the protection afforded by the law to the benefit of an unscrupulous claimant. The Civil Justice Council may wish to consider whether it is possible to build in a protection mechanism, such as by only allowing the waiver to be possible where both parties are legally represented.

3 QUERIES

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