

## **Public and private enforcement challenges and opportunities**

Speech to the Law Society's European Group

By Philip Collins

Chairman, Office of Fair Trading

6 June 2006

---

### **Scope**

The aim of my talk this evening is two fold.

First I want to consider the role of private enforcement in our competition regime and the opportunities and challenges that its development raises. In doing that I will touch on some of the ways in which the OFT may be able to contribute to more effective private enforcement.

Second, I will talk about a number of important issues which the OFT is considering in its public enforcement role to help ensure the best return for the investment that taxpayers have made, and continue to make, in our competition regime. In particular I want to share with you some of our preliminary thinking on maximising the impact of our public enforcement work through settlement of cases with parties who offer redress to the victims of an infringement; and to consider how we engage with parties – and they with us – during the investigation process.

### *Some preliminary points*

I start with a simple proposition: a successful competition regime needs public resources to be supplemented or complemented by private resources through actions in the courts. It has been suggested however that private enforcement of competition law is in a state of 'total underdevelopment' in the EU.<sup>1</sup>

---

<sup>1</sup> According to *Study on the conditions of claims for damages in case of infringement of EC competition rules, Comparative Report*, Ashurst, 31 August 2004, 'The picture that emerges

In the UK, the picture is mixed: on the one hand English courts are generally regarded as a centre of excellence for litigating commercial disputes, and have to a certain extent, led the field in the context of remedies for breach of EC law. In particular, it has generally been accepted for well over 20 years that damages should be available in English law as a remedy for breach of the EC competition rules. In addition claimants can bring actions following on from decisions of the OFT and the EC, either themselves or through consumer organisations such as Which? Both the case law and the statutory framework have developed. Whilst there may be some fine-tuning required, the core elements are all in place.

The case law was quick to develop after the UK joined the 'Common Market'. Some of you will have studied early cases such as *Application des Gaz S.A. v Falks Veritas Ltd*<sup>2</sup> in which Lord Denning started his judgement, with the admirable clarity and simplicity for which his judgements were famous, as follows:

*'1. Before England joined the Common Market*

This is the first case in which this court has had to consider the Treaty of Rome. It comes about because of a tin can. If you should go for a picnic or camping, you will be likely nowadays to take with you something to boil water. One of the most useful is a tin can containing butane gas in liquid form.'

And, so it went on with Section 2 headed, inevitably, '*After England joined the Common Market*'.

Of course, it is 23 years ago later this month, and only ten years after the UK joined the 'Common Market' that the House of Lords gave their landmark judgement in *Garden Cottage Foods Ltd v. Milk Marketing Board*,<sup>3</sup> following which it was generally accepted that damages should in principle be available as a remedy for infringements of competition law. (Again, for those who favour short, clear judgements, Lord Denning's judgement in the same case in the Court of Appeal is also worth reading.)

Much more recently, in *Provimi v Aventis*,<sup>4</sup> the High Court held that where a UK company in a group implements and gives effect to a cartel agreement entered into by the same undertaking, a claimant may bring a private civil action in London in respect of all its European losses, instead of having to pursue separate claims in multiple jurisdictions. This creates great incentives for potential claimants to choose to litigate in

---

from the present study on damages actions for breach of competition law in the enlarged EU is one of astonishing diversity and total underdevelopment.'

<sup>2</sup> *Application des Gaz S.A. v Falks Veritas Ltd*, [1974] Ch. 381, [1974] 3 All ER 51, CA.

<sup>3</sup> *Garden Cottage Foods Ltd v. Milk Marketing Board*, [1984] 1 AC 130; [1983] 2 All ER 770, HL.

<sup>4</sup> *Provimi Ltd v Aventis Nutrition SA and others*, [2003] EWHC 961 (Comm).

the UK, taking into account the extensive discovery rules, the availability of pre-judgment interest and the significant expertise of its competition lawyers.

On the other hand few cases have actually reached the stage of trial and judgement.<sup>5</sup> I know from my own experiences and from speaking to a number of practitioners, that there have been a substantial number of competition law-based disputes which have been settled out of court or resolved by arbitration or mediation.<sup>6</sup> What is also clear is that a number of these have 'followed-on' from OFT enforcement activity. There appear to have been fewer direct actions initiated before the courts by parties suffering loss or damage from alleged competition law infringements.

Why the lack of direct actions before the courts and why so many settlements? This may be the result of the legal community regarding it as difficult to prove infringement claims in private proceedings and taking the view that the easiest route for the client is to make a complaint to the OFT and to rely on the OFT to carry out an investigation and take a decision, which can then be used as a basis for a follow-on action. It may also be the case that competition lawyers are not, by instinct, litigators and therefore look, in the first instance, to more commercially-based resolution of disputes. There may also be other reasons, of which costs, cost rules and litigation risks are the most significant.

Whatever the causes, the lack of private enforcement in the European Union has been a concern for some time. The publication of the European Commission's Green Paper and Working Paper, *Damages actions for breach of the EC antitrust rules*, has brought the problem into sharp focus and triggered a great deal of discussion in the competition community on how best to promote (or, in some cases it appears, whether to promote at all) the private enforcement of competition law. The Government and the OFT have submitted responses to the Commission's consultation, which are available on the DTI and OFT websites respectively,<sup>7</sup> and the OFT is also actively engaged in discussions on private enforcement at international level, for instance at the OECD and in the ICN.

---

<sup>5</sup> These include, of course *Arkin v. Borchard Lines and others*, [2003] EWHC 687 (Comm) and *Crehan v. Inntrepreneur and others*, [2004] EWCA 637, which is currently before the House of Lords. More recently, the High Court has given judgement in an Article 82 case where it decided in favour of the claimant: see *Attheraces Ltd v. The British Horse Racing Board* [2005] EWHC 3015 (Ch), 21.

<sup>6</sup> See also Ashurst Report, p.1: '[*Provim*] is one of a long line of cases understood to have been threatened or commenced in the UK courts which have been settled over the last 20 years or so. Anecdotal evidence suggests that damages equivalent to many millions of euros have on occasions been paid to settle cases.'

<sup>7</sup> The Government's response is available at the following website:

[www.dti.gov.uk/files/file28534.pdf?pubpdfload=06%2F1180](http://www.dti.gov.uk/files/file28534.pdf?pubpdfload=06%2F1180).

For the OFT's response, see [www.offt.gov.uk/NR/rdonlyres/6741122E-D3F7-4210-AA1F-53EFCFD358E9/0/oft844.pdf](http://www.offt.gov.uk/NR/rdonlyres/6741122E-D3F7-4210-AA1F-53EFCFD358E9/0/oft844.pdf).

## *How can the OFT contribute to promoting effective private enforcement?*

First and foremost, I believe that as a public body responsible for enforcing the competition rules in the UK, we have an obligation to encourage private enforcement which complements our public work. We can do this through a variety of means, of which this event and a public seminar we are planning to hold this autumn to discuss private enforcement are just examples of interacting with the relevant parts of the Government, with business and with the legal profession.

In addition we believe that we can carry out useful work with the courts and the judiciary, to help prepare for increased private enforcement of competition law. This includes assistance with the training of judges in competition law, in which we are already actively involved and wish, alongside others, to do more. All of this is part of our advocacy role.

### *Intervention*

On a formal level, it is important that, in appropriate cases, the OFT should submit observations to national courts under Article 15 of Regulation 1/2003. As you may have seen, we have recently intervened to make submissions on certain public policy issues arising in *Bernard Crehan v Inntrepreneur Pub Company (CPC) and Brewman Group Limited* which is now before the House of Lords. Our intervention in that case is to a significant extent motivated by the need to ensure that their Lordships appreciate the importance of their ruling for issues relating to effective private enforcement.

When would the OFT look to intervene? It is difficult to identify all of the circumstances in the abstract and I would hope that the effective operation of the competition regime would mean that these occasions would be relatively rare.

The clearest situation is where wider policy issues are involved which may not be reflected in individual parties' pleadings. These are inevitably based on their own positions on the facts and arguments. There may be, for instance, issues concerning the consistency and coherence in the development of the law, at both UK and European level; or it may be important that the court is made aware of issues or developments which the parties may have no incentive to bring to its attention, or indeed of which they may be unaware.

### *Role of OFT decisions and statements before the courts*

It will however not be possible for the OFT to intervene in every case which potentially raises policy issues. If private enforcement increases, as we hope it will, we will need to look at innovative ways to ensure consistency. One idea is for OFT's own decisions and

statements (including guidelines) to have a greater significance in proceedings by obliging courts to have regard to relevant OFT decisions and statements in cases before them, in the same way as they must have regard to EC Commission decisions and statements under Section 60(3) of the Competition Act. To the extent that legislation is required, this would, of course, require Government approval.

### *Facilitating private enforcement through casework*

The OFT may also be able to encourage increased private enforcement in the context of its own casework. But we cannot do so if that may prejudice or impede our public enforcement work.

For example, the likelihood and extent of follow-on actions is a factor that we could take into account when prioritising those cases to investigate.

It has also been suggested that the OFT could assist potential claimants by seeking to quantify the loss caused by infringements of competition law and to set out its conclusions in its published decisions. However, although this may at first sight appear attractive, I have some reservations. In particular, quantifying the loss or damage caused is not an assessment which the OFT is required to carry out in order to establish an infringement. To do so would be a complex and resource intensive exercise that would ultimately reduce the number of public cases that we can pursue.

That said, if, during the course of an investigation, we obtain evidence as to the actual effect of a cartel on say, prices, we will consider citing this where by doing so could encourage follow-on actions.

### **Activating section 16 of the Enterprise Act 2002?**

When the Enterprise Bill was before Parliament, there was a significant amount of debate in the House of Lords about the appropriateness of introducing an amendment which can now be found in section 16 of the Enterprise Act 2002. This provides that the Lord Chancellor may by regulation make provision for a court to transfer to the Competition Appeal Tribunal for determination proceedings in which issues of competition law have arisen. Accordingly, section 16, if activated, would provide the Competition Appeal Tribunal with original jurisdiction over breaches of competition law.<sup>8</sup>

It has been suggested that activation of section 16 would have the effect of stimulating private enforcement by providing parties with access to a specialist tribunal. Against that, however, it has been argued that the increasing expertise among the judiciary in

---

<sup>8</sup> See for instance the discussion in *'Productivity and Enterprise: A World Class Competition Regime'*, especially paras 8.6 to 8.11.

competition law, and notably the fact that a number of High Court judges now sit part-time in the Competition Appeal Tribunal, could be lost. It could also have an impact on the institutional balance sought by Parliament under the Competition Act. One of the arguments put forward by the Government, at that time, was that under Regulation 1/2003 it was for the OFT to ensure consistency by submitting observations to national courts on issues relating to Articles 81 and 82.

Now may be a good time to have a further debate about section 16. While the OFT will make use of its power to submit observations to national courts, there may be a case for enabling a dedicated specialist tribunal to focus on private enforcement actions.

However, it is also important to stress that in any debate on section 16, the implications for the relationship between the work of the Competition Appeal Tribunal in relation to both public and private cases and that of the OFT and the concurrent regulators would need to be carefully reviewed and considered. In particular, there is the need to ensure that the bodies responsible for limited public resources can deploy them to best effect in selecting and prioritising the cases for which public enforcement is appropriate. In *Automec*<sup>9</sup> the CFI recognised that because of limitations of resources the Commission could not sensibly be treated as having an absolute duty to take decisions on every complaint to it, especially when the jurisdiction of national courts to afford relief to a complainant was taken into account.

### **Private enforcement: safeguarding the effectiveness of the OFT's public enforcement role**

Notwithstanding the benefits of increased private enforcement in the UK, we must recognise the need, in promoting private actions, to ensure that we do not at the same time undermine the effectiveness of public enforcement.

#### *Preserving the effectiveness of the leniency regime*

One question is whether increased private enforcement might discourage undertakings from applying for leniency due to the possibility of follow-on damages actions. Our leniency programme has been, and continues to be, a great success in uncovering cartels. We must not prejudice that success.

However there are a number of reasons why a company which has discovered that it is party to a cartel will still want to apply for leniency despite the threat of private actions.

---

<sup>9</sup> T-24/90 *Automec* [1992] E.C.R. II-367, [1991] 4 C.M.L.R. 177

It may be a matter of corporate governance – with greater attention being given at main board level, and amongst non-executives – to compliance issues. I expect greater focus on corporate governance at the highest levels, including the role of non-executives, to be an increasingly important factor that will drive competition compliance and encourage leniency applications.

There will also be cases where the business concerned has recently been purchased and liability can be passed back to the vendors. Unlawful activity may be uncovered during due diligence, either on the vendor's or the purchaser's side. Management changes, with new managers from outside the business not wishing to be compromised by inheriting unlawful activities can also stimulate action on leniency. There is also, of course, the risk that if no leniency application is made by the business concerned, another participant may decide to expose the cartel by making its own application for leniency. This may especially be the case with 'end-of-life' cartels where the cartel has become unstable, and one participant decides that it can gain an advantage by applying for leniency.

So it is not apparent that the threat of private actions is, or should be, a real constraint so far as practitioners are concerned in advising clients on making leniency applications.

#### *Disclosure of documents to facilitate private damages actions*

Another important issue is access to documents. Where a competition authority has not yet published or otherwise made available its decision in a given investigation, a claimant in a private action might ask to see documents created for inclusion in, or to support, a leniency application made by the defendant.

We believe that, in order to maintain the effectiveness of the leniency regime, a claimant should not be allowed access to those documents in such circumstances. However, precisely how this should be achieved is an open question: any measures to prevent leniency applications being used against leniency applicants will need to be accommodated within the existing rules. The OFT would, of course, need to comply with any court order requiring access, but would not expect a court to order access if that would, in effect, compromise or inhibit public enforcement.

Where leniency documents are released to the other infringing undertakings to enable them to exercise their rights of defence, we also consider that restrictions must be placed on the use to which those documents can be put – and we would expect the restrictions to be upheld by the courts. We understand that there has been at least one instance of a claimant obtaining from an infringing undertaking a copy of the corporate statement submitted to the European Commission as part of a leniency application and

seeking to rely on it against the Commission's leniency applicant in a private action in another jurisdiction (the United States).

Although, therefore, we are prepared to protect the leniency applicant to some extent, we do not believe that any reduction of rights to recover damages would be justified. We do not support any removal of joint and several liability from the leniency applicant or any 'discount' on the damages he should have to pay. However, under the general law of England and Wales, claimants are able to sue and obtain judgment against a leniency applicant under normal principles of joint and several liability, whilst the court is empowered to allow the leniency applicant, in turn, to seek contributions of up to 100 per cent from the other cartelists. This preserves the victim's right to sue whoever he chooses and obtain full recovery whilst recognising that incentives for undertakings to apply for leniency must be preserved.

This raises an interesting strategic point for the leniency applicant. Typically in many cases there will be a continuing business relationship between the cartelists and their customers who have suffered loss or damage. The well-advised leniency applicant may decide that it is in his best commercial interests, having secured immunity from fines, to seek to achieve a quick commercial settlement with his customers and move on, typically under new management, to 'business as usual'.

Suppose, however, that the other cartelists are sued by the customers, the case is contested, damages are awarded and the other cartelists then seek contributions from the leniency applicant who has already settled – probably on advantageous terms – with his customers. I would suggest that in such a situation, the courts should be reluctant to order a contribution in the light of, first, the leniency applicant's role in bringing the cartel to light and, secondly, its settlement with its customers.

### **Concluding remarks on private enforcement**

Leaving all these issues aside, there remains, of course, a fear that encouraging private enforcement will unleash an uncontrollable flow of complex, and often speculative, litigation that will be burdensome, expensive and time consuming for all concerned. These fears are, at least in part, fed by what is perceived to be the experience in the United States.

There is clearly an issue as to whether the 'loser pays all' principle that applies generally in relation to costs in English civil litigation is appropriate for competition cases or whether some other, more flexible, rules would be more suitable for such cases.

There is also a concern, arising not only in competition cases but in relation to commercial litigation generally, that the English system – especially compared to some

continental systems – is becoming ever more complex and expensive. This issue is, I believe a real challenge for the legal profession in the UK, especially considering the potential for clients in at least some cases to bring actions in jurisdictions – competing jurisdictions - elsewhere in the EU or to resort to methods of resolving disputes that have less input from the legal profession.

Despite those reservations, I firmly believe that private enforcement has a vital role to play in contributing to effective enforcement of the law and to encouraging a culture of compliance throughout the UK to the benefit of consumers. In order to achieve this, it is important that the legal profession advises its clients appropriately about the merits and conduct of their cases and that appropriate case management directions are given by the court and complied with by the parties.

We all have a part to play in ensuring the system operates effectively and efficiently. In recognition of this, we would like to engage to a greater extent with the legal profession as well as with business, the courts and the judiciary. With direct access to boards or directors and senior management, English lawyers are extremely well placed to judge what adjustments to the system are, or are not, required. We would welcome views as to how the OFT can best engage with the legal profession in order to advance the private enforcement agenda.

I am pleased to announce that we will be holding a public seminar in the autumn on how best to promote private enforcement and details will be given out as soon as they are settled.

### **Public enforcement issues and challenges**

As the UK's competition regime and our own experience in case handling has developed, so too has the OFT's approach to enforcement action. To maximise our impact and achieve effective and timely deterrence, we have developed a system of case prioritisation, which we are continually refining, to help ensure that we target our limited resources on investigating the most serious forms of anti-competitive behaviour. We feel that such an approach is not only good for the development of the UK's competition regime as a whole but also for businesses under investigation, who I hope will see an improvement in the length of time taken by the OFT to reach a view as to whether an infringement has been committed.

However more needs to be done. We are therefore also looking at all our processes and policies to ensure that we are able to maximise the impact of our work. In the time I

have tonight I obviously cannot cover all the initiatives we have taken, or are taking, a number of which have already been mentioned elsewhere.<sup>10</sup>

### *Settlements with redress*

As many of you will know, we recently brought to an end the OFT's investigation in the *Independent Schools* case. As part of the settlement, the schools under investigation agreed to make ex-gratia payments totalling £3 million<sup>11</sup> to a charitable trust fund to benefit the pupils who attended the schools during certain academic years. In addition, the schools will pay a nominal penalty of £10,000 per school. This is a good result for the pupils concerned and their families, the schools who can now put this behind them, and the competition regime – indeed the resources which would have been expended on the case had it not settled have already been allocated to other hardcore cases.

The *Independent Schools* case had a number of exceptional features which facilitated the approach outlined above. However its success has encouraged us to consider whether such an approach might usefully be used in some other cases.

We are not alone in this. As you will know DG-Comp is thinking along similar lines, drawing on the US experience of 'plea-bargaining'.<sup>12</sup> (For our part, we prefer to avoid that term which is more suited to the US system and to use the term 'settlement' instead.)

The key point here is that this is not about disposing of cases to get rid of them. It is about trying to ensure that we use our resources to maximum effect to dispose of a greater number of cases in a shorter timescale whilst, at the same time, contributing to effective enforcement and deterrence through such decisions. Settlement also meets the needs of some businesses who want to avoid long-drawn out proceedings and achieve earlier determination of liabilities so that they can get on with their normal business activities.

Our thinking is still very much developing on this but I offer the following preliminary thoughts.

First, we need to recognise that there is a tension between encouraging parties to settle cases with the OFT and encouraging those who believe that they have suffered loss or damage to initiate private actions before the courts. Such persons are less likely to sue,

---

<sup>10</sup> See, for instance, my speech of 1 December 2005 available on the OFT's website.

<sup>11</sup> As part of the settlement, the OFT will adopt an infringement decision but the decision will not include a finding as to the actual effect of the infringement on fees.

<sup>12</sup> See, for instance, the speech of Neelie Kroes, Commissioner for Competition, 'The First Hundred Days', Speech/002/205, 7 April 2005, at page 5, available on the DG-COMP part of the Commission's website.

and may even be prevented from suing, an infringing undertaking which has already made redress to them following an agreed settlement with the OFT. It may be, therefore, that settlements would be most often used where the OFT believes the persons who may have suffered loss or damage as a result of an infringement are unlikely to seek damages before the courts. However I certainly do not want to close the door to other scenarios and we are considering this issue in more detail. If we do go further down this road, which in principle I favour, we have to ensure that we do not hamper the development of private enforcement in the UK.

Second, how could the OFT encourage parties to come forward with offers to settle cases by making redress to those who may have suffered loss or damage?

One option we are currently considering is whether to offer to reduce any penalty which we are minded to impose on an undertaking by an amount which would incentivise the undertaking to offer redress. The extent of the reduction in penalty in any given case could be determined having regard to the importance which the OFT attaches to incentivising a party to make a comprehensive offer to settle.

This would suggest that we would need, in most cases, to issue a statement of objections against the undertaking concerned, in order to set out the nature of the evidence against it and to give some indication of the penalty we are minded to impose. Whether we would need to issue a full statement of objections in every case may depend upon the particular circumstances, taking account of the need, for example, to impose a penalty and the approach taken by the parties and their lawyers. It is worth noting that the *Independent Schools* settlement was made possible, in part, because of the co-operative approach taken by the parties. They agreed to limit their representations to material factual inaccuracies in the Statement of Objections and made those representations on a joint basis.

Third, we would need to consider carefully the extent to which settlement of cases in this manner could have an impact on both deterrence and undertakings' incentives to apply to the OFT for leniency. The OFT would not accept any approach which led undertakings to conclude that it was better to avoid detection in the knowledge that, if detected, they could offer to settle with those who had suffered loss or damage in order to benefit from a considerable reduction in penalty.

Fourth, we would need to think about how those suffering loss or damage can be identified. In the case of end-consumers, creative efforts would have to be made to determine the class, or a proxy for the class, of consumers who had suffered.

## *Amnesties*

In addition to settlements generally, we are also looking at developing innovative settlement procedures for hard core cartel cases where there are a significant number of parties, particularly in industries where cartel-type problems appear to be endemic.

One option might be to go down what can loosely be called an 'amnesty' route. This would involve undertakings, or groups of undertakings (perhaps through trade associations), coming forward with details of their involvement in cartel activities, in return for a commitment from us to take limited enforcement action against them on the basis of such disclosures. It seems to us that, properly applied, the declaration of amnesties could be an effective way of ending anti-competitive conduct whilst sending a clear deterrent message to the specific sector concerned, as well as to related or adjacent sectors and to business generally.

It would be important to ensure that collusion in business did not migrate to collusion in amnesty-seeking and in settlement. The introduction of an effective compliance programme is likely to be a feature of any amnesty arrangement. And, of course, those who had benefited from an amnesty would have only 'one bite at the cherry'; future infringements would be subject to increased penalties.

There are, of course, many challenges to face in devising this sort of system. We would need to ensure, for example, that as in the case of settlements generally, the introduction of an amnesty did not have an adverse impact on the leniency programme. We would also need to think about the practicalities of dealing with what might potentially be a 'flood' of applicants when an amnesty is declared. Above all, perhaps, we would need to ensure that applicants were adequately incentivised to apply under an amnesty without at the same time diluting the OFT's overall strong enforcement activity in cartel cases generally.

### **The OFT's casework**

One of the features that is common to both these ideas is the importance of a constructive approach by the parties involved. If the UK's competition regime is to function optimally, then we need to give thought to how we work together with the parties to our investigations, third parties, and advisers. We also need to consider the interaction between the OFT and the other main players in the competition regime including the Competition Appeal Tribunal.

In making the following comments I am reflecting, in particular, comments that I have received from business people and competition practitioners since taking up my appointment.

## *Our engagement with parties*

I mentioned earlier that we have been working on improving the prioritisation of our casework in order to concentrate on high-impact cases. At a more micro level, we have also been looking at how we engage with parties, and third parties, during the course of our investigations.

It is evident that there are a number of areas where there is room for improvement on our part – we need, for example, to engage more actively with parties during the early stages of our cases, and to keep them better informed as to our progress on a regular basis. In addition, we are currently reviewing how to make the best use of our information-gathering powers, in order that the burden on businesses under investigation remains proportionate. All that is work-in-progress at the OFT.

At the same time, it is clear that responsibility rests with businesses and their legal advisers to play their part in helping us to conduct our investigations as efficiently as possible. We recognise, of course, that lawyers are engaged in order to protect their clients' interests. That said, we expect parties and their lawyers to engage with us on a constructive basis, by meeting reasonably imposed deadlines, and by not seeking to impede or slow down our investigations.

There have, for example, been occasions where parties have provided a huge amount of irrelevant material in response to an information request, often without explanation or even indexation, which has required a considerable amount of needless extra work by our case teams, with all its consequent delay.

Similarly some advisers have taken points which, on any reasonable basis, could in no way alter the outcome of the case but nevertheless have to be dealt with. In my view these 'tactics' are not in the best interests of the clients. We will not allow such tactics to stop us from vigorously pursuing infringements. We are expected to deliver the best from the UK regime, and both the OFT and the courts will have to ensure that they take effective action to prevent cases being slowed down, or made unnecessarily complicated, by what are essentially just procedural manoeuvres.

In my view lawyers serve the interests of their clients best by engaging constructively with the authorities. How is this best done? Other than avoiding the practices outlined above, one way would be to improve the user-friendliness of submissions by focussing them on the key issues and making them readily understandable.

An important point here is to ensure that the legal and the economic aspects of the case are properly integrated so as to give a fully joined-up presentation. On a more practical

level, for example, the use of a summary at the beginning of a document improves its usefulness significantly. Submissions should be kept as short as practicable and should concentrate on the key points and avoid repetition.

You might also want to think about the role of business people in the presentation of cases. A good business person who understands his market and his company, supported by appropriate contemporary business documents, can be a far more effective advocate (or defender) of the case than a series of finely-honed submissions prepared by lawyers and economists. Officials in competition authorities and judges are usually keen to hear from the business people involved in a case.

### *Interventions by competitors*

Whilst on the subject of business people, as I have commented before, there seems to be a perception among at least some practitioners that the OFT is a publicly funded resource that can be used as an effective tool in business to business, competitor to competitor battles in the market. The current set-up of the competition regime has meant that substantial resources have had to be devoted to pursuing complaints where, in reality, the complaint is about the pressures, or the threats, of the competitive process, there is no evidence of consumer detriment and, on the contrary, consumers will benefit from increased competition.

This is, at least in part, an issue for us to tackle – we need to make sure that we pick our cases appropriately. However, there is also, more generally, a serious debate that needs to take place about the use of public resources on competitor-inspired complaints.

### *Compliance by business*

One final challenge for the legal profession - on the subject of compliance.

It is trite to comment that lawyers generally benefit from non-compliance by their clients as it brings casework. The fees to be earned on casework are generally greater than the fees that can be earned for compliance work. One lawyer even suggested to us recently that we must bring more cases as that would help his firm's business development in marketing compliance programmes – as if there was not enough case law in existence already which he could exploit to enhance his marketing efforts.

The issue for me is this: are the existing efforts of law firms to educate business on compliance really effective? Are lawyers the best people to deliver compliance messages and systems? Are they using the right tools? If not, who is best placed to succeed?

## **Conclusion**

We regard private enforcement as an essential complement to public enforcement. At the OFT we strongly support the development of private enforcement - both follow-on and direct actions. And we are considering the ways in which we may be able to facilitate an increase in private actions.

What is clear is that competition authorities cannot, and should not, take on every case. Our work has to be prioritised, limited taxpayers' resources allocated accordingly and the progress of cases speeded up. At the OFT we are adapting our organisation and our processes accordingly, by looking at how we choose our cases, how we run them, and whether there may be scope for alternative settlement mechanisms which do not require a full-blown administrative procedure.

While we consider that the fear of large-scale speculative litigation in competition cases is unfounded, provided there is effective judicial case management, there appear to be real issues from business about the cost of private litigation, in competition cases as well as generally.

For both public and private enforcement, the legal profession can do more to ensure that clients' cases are presented and pursued in the most efficient and cost-effective way. If it does not, then perhaps business will increasingly turn to other suppliers for all or part of this work; and some private actions may move to other, faster and more cost-effective jurisdictions.

I will end where I started – with Lord Denning. In his first European law case – the so-called Champagne case – in 1974, he said:<sup>13</sup>

'...when we come to matters with a European element, the Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back. Parliament has decreed that the Treaty is henceforward to be part of our law. It is equal in force to any statute.'

Five years later, he said:<sup>14</sup>

'Now in 1979, the tide is advancing. It is no use our trying to stop it, any more than King Canute did. He got his feet wet; I expect we shall all get our feet wet too.'

In 2006, I suggest that it is time for more competition practitioners to get their feet wet - by working constructively to resolve public enforcement cases before the OFT economically and efficiently, whether by full decision or by settlement; by encouraging

---

<sup>13</sup> *Bulmer v. Bollinger* [1974] 2 All ER 1226, 1231.

<sup>14</sup> 'The Incoming Tide' The Lord Fletcher Inaugural Lecture, 10 December 1979.

the use of private enforcement in suitable cases, again in a cost-effective and efficient manner; and, of course, by delivering excellence in compliance programmes to business.

Thank you for the opportunity to speak to you this evening.