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## Protecting the consumer: enforcing competition and consumer law

Speech to the Law Society's European Group

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This evening I'd like to talk about consumer law: but in the widest sense. That then includes everything that the OFT does. So, to keep within time, I'll need to narrow it down a bit!

I'd like to take a look across the piece at *remedies*: how do we stop harm to consumers and how can we make sure that consumers who have been the victims of sharp – and unlawful – practice get compensated.

Of course this isn't the only way we in the OFT act to protect consumers. A lot of our work is preventive – making sure that those who operate in a market are fit to do so but that there are no unnecessary barriers to consumer choice. Examples include our consumer credit licensing work, or our market studies and other competition advocacy efforts – for example on taxis or retail pharmacies. What these types of work have in common is that they don't require us to find that anyone has done something wrong. And they are a very important part of the work the OFT does in the consumer interest.

But this evening I'm not going to touch on the regulatory and advocacy work we do – but rather on enforcement: acting on evidence to stop breaches of the law and provide a remedy to those affected.

I believe the greatest areas of commonality in enforcing both competition and consumer legislation is in ex post enforcement intervention in favour of the consumer. In particular, the policy aims of both sets of enforcement legislation are the same.

Prevention (including deterrence) and redress.

What separates the two legislative regimes is the degree of development of the respective systems. But, I believe, there is nevertheless enough similarity for us to be able to apply consistent enforcement techniques across the piece. What I would like to do this evening is to offer some thoughts – largely on a personal basis – as to how we can develop a single coherent public enforcement regime for both competition and consumer law.

And I'd also like to offer some additional thoughts on private enforcement to complement both what I say about public enforcement now and what our Chairman, Philip Collins, said here a month or so ago.

Before I turn to discuss these issues though, I think it would be worthwhile simply outlining the respective legislative regimes I am dealing with this evening.

The competition enforcement regime is well known to most of you. The Competition Act 1998 prohibits agreements and concerted practices which distort competition and also abuse of a position of market dominance. As those of you who follow the policy debate know, we are increasingly looking to intervene on the basis of the effects we think the infringing behaviour has on consumers. We will still, of course, need to ensure that hard-core infringements are dealt with effectively in order to provide sufficient deterrence.

Parts 3, 4, 6 and 7 of the Enterprise Act 2002 respectively provide for UK merger control, the market investigation regime, the criminalization of hardcore cartel behaviour by dishonest individuals and for the disqualification of directors whose companies have infringed competition law. Again we act in the consumer interest when applying these powers.

Consumer law is more widely scattered across the statute book – the most recent legislation being this year's new Consumer Credit Act – and some of it is 30 or so years old, for example the Unfair Contract Terms Act (which dates from 1977). A large amount of UK consumer law has originated from Brussels in the last 10 years or so and a general consumer law enforcement power was included in Part 8 Enterprise Act 2002. This covers enforcement of most of these statutory consumer powers.

In contrast to the competition enforcement system, Part 8 requires an application to the court for an enforcement order – the OFT does not have the power under consumer law to take binding enforcement action itself. But in most other respects the two enforcement systems have very similar features.

First the OFT shares enforcement competence with others: notably the local Trading Standards Services, but also other UK or EU consumer enforcement bodies. Almost a system of 'concurrency', I suggest. And the OFT has the power under Part 8 to step in and take enforcement action if we think that either we or another enforcer is better placed than the one intending to take the action: perhaps a consumer law equivalent of the consultation requirement before a concurrent regulator exercises Competition Act functions?

Second there is now co-ordination of consumer enforcement policy at a European level. Rather than co-operation organized through a Commission notice – which, of course, is the way the European Competition Network was set up - consumer enforcement is co-ordinated by regulation (the Consumer Protection Co-ordination Regulation<sup>1</sup>). This has set up a standing (comitology) committee – and the OFT is the UK's single liaison office and member of the committee, as it is in the ECN.

Thirdly, the consumer enforcement action the OFT and others take can give rights to redress to affected consumers (and others!). Although there is no consumer law equivalent of the Competition Act s 58 provision making infringement decisions binding on the civil courts in damages actions, the fact that a Part 8 enforcement order has been made is admissible as evidence in breach of contract or tort actions. We should, in my view, be able to build on this to encourage private enforcement of consumer law. Again more on this in a moment.

And finally here, there is an equivalent of the Competition Act commitments process. Instead of taking action under Part 8, the OFT (or other enforcer) or the court can take an undertaking from the infringer not to continue or repeat the infringement and/or requiring a corrective public statement to be made. Of course, whether such an undertaking should be accepted depends on the circumstances: it may be possible to take into account a genuine offer of consumer redress, for example – mirroring our emerging thinking on the competition enforcement side. Again I'll discuss this a bit later.

As I said at the beginning of this talk, the consumer law enforcement system – at least at a national level – is relatively less developed than the competition enforcement process. But this is about to change!

And, as with the recent reforms of competition enforcement, Europe has now become the focal point for new legislation in the consumer law area. You all need to be aware of this – it will, I think, in time become as important for your clients as competition law is now!

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<sup>1</sup> Regulation EC 2006/2004.

There is significant change on the substance of consumer law as well as on process: I will touch briefly on this, since it is not the main focus of my remarks this evening. But the changes are fundamental.

The Unfair Commercial Practices Directive<sup>2</sup> must be implemented by December of next year. Importantly it requires member States to introduce a general prohibition on traders trading unfairly when dealing with consumers. This concept is explained in more detailed prohibitions of misleading and aggressive practices set out in the Directive. The exact scope of the prohibition will need to be developed though the case law of the courts required to apply it – possibly with references to the European Court of Justice in Luxembourg on key issues. The Directive itself also lists 31 practices which are deemed to be unfair in all circumstances where a business deals with a consumer. This is to ensure that the Directive applies as evenly as possible throughout the EU – it is in principle a maximum harmonization measure so that member States may not generally maintain incompatible national legislation even if it provides consumers with a greater level of protection than provided in the Directive. There are a few exceptions to this: more prescriptive rules may be retained in financial services and immovable property (and, bizarrely, hallmarking), as well as where the consumer provisions derive from minimum harmonization clauses in other EU directives. This is to ensure that businesses (as well as consumers) are able to buy and sell freely throughout the Union through the same advertising and other marketing techniques without falling foul of local variations in fair trading laws.

Implementing the Directive will be a major task in the UK. The DTI has been consulting on how best to implement the Directive in the UK and is due to publish the Government response in the summer.

Although, as I said, the interpretation of the Directive is ultimately a matter for the courts, we are working with the DTI to produce illustrative guidance on what we think the Directive means in practice. And, of course, we will also need to think about our own enforcement policy in this area. I understand that it is currently envisaged that the existing powers in Part 8 of the Enterprise Act will form the basis for enforcement of the Directive and the UK legislation under it – although there may also be other (eg criminal law) powers as a complement. This means that we have an opportunity here to develop, through guidance, a coherent consumer enforcement policy which is consistent with our processes for competition enforcement. We have, as you know revised our Competition Act guidance in parallel with the implementation of the modernization regulation in 2004. And the similar

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<sup>2</sup> Directive 2005/29 EC.

exercise in consumer law gives us an opportunity to rationalize our enforcement policy across the piece.

So, then, turning to the main focus of my talk this evening, where are the enforcement synergies?

I think there are two main areas where our competition and consumer enforcement procedures should overlap: at the point we decide what cases to take and what not, and at the point of considering the appropriate remedy. As I said at the beginning, I want to discuss some ideas about remedies as the main pivot of this evening's session. But first, and relatively briefly, what about enforcement prioritisation?

As both Philip and I have said in earlier speeches, on the competition side we have for some time now been using six broad heads or criteria for prioritising our competition enforcement casework. They are:

- likely size of the consumer detriment arising from the behaviour identified
- strength of the evidence at any stage – in particular, is there enough evidence to justify going forward to the next stage and is there a reasonable prospect that we will be able to gather the evidence we need to make out our case within a reasonable timeframe
- type of case – in particular is this a hardcore case?
- special circumstances of the case – are vulnerable consumers affected? Has there been anything about the conduct of the parties which makes this case stand out?
- policy considerations. In particular, will this case help develop the law? Does it have a particular deterrence value?
- is the OFT best placed to act? Are there other means (for example, through advocacy or by private enforcement) of achieving the same ends?

We have been using these criteria for 18 months or so now, to good effect. And I believe that they, or something like them, should also form the basis for prioritising our work more generally across the OFT. In particular, they seem to me to be well adapted to prioritising our consumer enforcement work.

We are, as you will have seen from our annual plan, looking again at our prioritisation criteria as part of this year's work plan. Although I do not expect the substance of these basic criteria to change greatly, we hope to be able to give a bit more detail as to what they mean and how they apply in practice across the OFT's work. So we should be able to make sure that a single set of enforcement priorities informs whatever cases we bring where we have a discretionary power, and not just those falling under the Competition Act.

But now, after that introduction, the main point I wanted to make today.

## **Remedies**

Is it possible to have a single coherent remedies policy across such a wide range of enforcement instruments?

I believe it is.

There is, as I noted earlier, a major difference between the competition enforcement and consumer enforcement legislation we apply: under the Competition Act we take binding decisions. We do not do this in any other of our ex post enforcement work – as distinct from some of our licensing based work (eg consumer credit licensing and estate agency enforcement).

But this is the only difference between the competition and consumer regimes, and it only bites relatively late in the process. Until then both process and enforcement techniques can be broadly similar.

So in the final part of this evening's talk, I'd like to focus on remedies in three contexts:

- 'hard' enforcement or settlement?
- grouping together public enforcement cases (an 'amnesty' approach), and
- using public enforcement to aid private redress.

I think that we can use the same techniques for both competition and consumer cases: we simply need to be clear from the outset what we are trying to achieve!

I should add here that we are also looking at how we can support and partner others who enforce competition and consumer law – for example the trading standards services, concurrent competition regulators and private parties to litigation. But, as I said at the beginning, this evening's talk focuses on what the OFT itself might do to enforce more effectively

First then, when should we consider settling cases and when do we have to take them through to the end?

There are two dimensions here, policy considerations and resources.

And so this question is closely linked to our overall prioritisation process which I outlined a moment ago.

The main policy issue here is, how great is the need to deter?

I do not maintain that settlements do not have any deterrence effect, of course. The US system of criminal plea bargaining, although it leads to agreed outcomes, still clearly has the effect of deterring breaches of the Sherman Act! But I do accept that there are some cases (possibly a relatively small subset however) which cannot be settled because they are so grave.

Nevertheless, what we have already done, on the competition side, is to have an agreed fine and a set of findings which are acceptable to all involved. So, in our independent schools case, we agreed a nominal fine of £10,000 per school and also agreed that there would be no finding in our decision as to effect. I would expect to see more of these kinds of settlements going forward. Although an agreed fine might not be as high as an imposed one, I would certainly not rule out substantial agreed fines – certainly enough to deter both the parties and others from engaging in cartel and other anti-competitive activity.

Of course, one reason why the US plea bargaining system works so well is that the US agencies have a good history of strong enforcement. Given the relative youth of the UK regime, we may need to be slower to accept settlements at first so as to establish our own track record of effective penalty setting. This is a delicate balance to which there are no easy answers.

We also have agreed outcomes in the form of commitments in Competition Act cases. There of course we cannot fine – so if there is a need to deter, commitments are not appropriate. Indeed our Competition Act guideline, *Enforcement* sets out in some detail the circumstances when we would not accept commitments for precisely this reason.

And, as I mentioned earlier, under the consumer enforcement powers in Part 8 Enterprise Act, both the OFT and the court can accept undertakings from the targets of our action instead of making (or applying for) enforcement orders. But here there is only a limited deterrent issue: there are still no civil fines for breaches of consumer law. So, at least at present, we can have a more liberal policy towards settlements in consumer cases.

However, I understand that the DTI is considering remedies as part of its thinking on implementing the Unfair Commercial Practices Directive and civil fines are definitely on the agenda. Professor Macrory is also currently carrying out a review of penalties and

enforcement tools for the Cabinet Office's Better Regulation unit – I expect that he too will recommend that enforcers be given as wide a range of enforcement tools as possible.

So I am hopeful that, relatively soon, civil penalties will be available for breaches of consumer law as well as competition law.

The European Commission is also looking into the effectiveness of eight older Directives relating to the economic interests of consumers (the so-called 'consumer acquis'). This review includes the injunctions Directive<sup>3</sup> which enables enforcers to take action against cross border infringements of certain EC consumer legislation. The injunctions Directive led to Part 8 of the Enterprise Act in order to give equivalent cover to domestic situations. The review may possibly lead to amendments to the injunctions Directive to allow for court ordered consumer redress or stronger adverse publicity orders.

Expect, then, negotiated settlements – 'structured settlements' as they have been called – to become a greater feature of both competition and consumer enforcement going forward. I believe that this will help us to progress our caseload more effectively and also help us better to reach proportionate outcomes in our enforcement casework.

The resources we expect to need to proceed to a final decision (or to contest a case at trial) will, of course, also play a part in deciding whether or not settlement negotiations will be entertained – although, I should say that, at least on the competition side, we are always open to sensible approaches with creative agreed solutions to cases!

Secondly here, grouping together public enforcement cases.

As many of you will know, the Dutch competition authority, the NMa, is in the middle of an 'amnesty' programme – and I use inverted commas around the word amnesty – for the construction industry. We are looking closely to see if we can learn any lessons from their approach!

I distinguish an 'amnesty' from a 'structured settlement' in two ways. Firstly there is no individual negotiation in an amnesty case: we would expect to advertise the terms on which we would make the amnesty available (which might include a tariff of penalties for example) in advance. Those who wished to take up our offer would be required to do so on the terms presented – including as to agreed penalty.

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<sup>3</sup> Directive 98/27 EC.

Second – and it follows from the first – there would be certainty 'up front' for amnesty applicants. For settlements, the negotiation process necessarily introduces an element of uncertainty. In particular, we cannot be clear, at the time any negotiations begin, that a settlement will materialize. If it does not, the OFT would normally expect to go to an infringement decision (or an application for a consumer enforcement order). For this reason, we usually have settlement negotiations dealt with by someone other than the case team (although they would of course need to keep in close touch with each other). The case team is not then contaminated by any knowledge of the 'without prejudice' settlement discussions.

None of this is needed in amnesty cases: the hard work for us is in the design of the process up front. And this is why I would suggest that amnesties will not be offered in the very near future. But we are keen as soon as we can to increase the effectiveness of our enforcement effort by using 'bundling' techniques such as these to bring results in areas where there may be a large number of relatively small infringers all engaged in similar unlawful behaviour. This means it should be possible to design a 'one size fits all' up-front approach without doing injustice and while making the amnesty programme attractive so that enough businesses take it up to make it a worthwhile use of public resources.

I suggest this makes amnesty programmes particularly appropriate for cartel work in some industries – construction springs to mind – and perhaps in some consumer work, where the unfair practices are endemic across a sector for example. So here too, you can expect a joined up policy approach to 'bundled' public enforcement – even if the techniques we have to use might differ according to the different legal regimes we operate in.

And thirdly and finally, how can and should we use public enforcement to assist private enforcement. I will not go over the ground covered by the DG Comp green paper on private enforcement this evening. The debate on that is ongoing and will inevitably inform our policy approach in this area. Instead, I wanted to put some thoughts to you on voluntary redress as part of either a 'structured settlement' or (although perhaps less likely) under an amnesty scheme.

As many of you know, we accepted, as part of the settlement in the independent schools case, an ex gratia payment of £3 million into a charitable trust fund. So, the question is whether and to what extent should we seek to promote this approach in the future.

There are two conflicting policy drivers here. We want to make sure that consumers are compensated where they have suffered loss as a result of breaches of competition or consumer law. But on the other hand we do not want to undermine the incentives on private parties to bring their own litigation claiming compensation. And, as I have

mentioned above, where litigation might be a sensible option, there is the question of the extent to which we should use public resource to achieve the same end.

I think it is possible to reconcile these two aims. And doing it depends very much on the type of market and infringement we are dealing with.

Let us take two hypothetical examples. A settlement of a bid rigging cartel case in the construction sector – for example a rigged contract for building a new school. And in contrast a settlement of a cartel case involving sportswear retailing. And I stress that these are indeed hypothetical cases – we have not accepted settlements in either sector to date!

In the first, bid rigging case, I very much doubt we would accept an offer of compensation as part of the settlement. Instead we would have to emphasise to the parties that they remained at risk of private litigation. The public authority tendering for the construction of the school is likely to be able to bring its own case for damages – the amount in question (say 10% of the contract value) will be substantial, giving an appropriate incentive to sue. And the local authority is able itself to sue: local authorities litigate almost routinely!

But in the second case, the sportswear cartel, we might well wish to see an offer of compensation into an appropriate trust (not necessarily charitable). The victims of the cartel – individual consumers – have little incentive to sue. The losses each would have suffered on the purchase they have made (£15 per purchase in our soccer kit case) would be small in relation to the risk of litigation.

And it is doubtful that the average consumer has the ability to mount a successful competition case without expert (and expensive) legal assistance!

Representative consumer bodies may have greater incentives to bring an action, but that is a whole issue in itself and too large for discussion this evening.

Of course, for OFT, even setting up a trust to distribute the compensation offered would not be easy – various difficult (but not insoluble) questions arise – not least working out who should be eligible and how they should be required to prove it (is a till receipt enough?). Again we would need to think carefully about the mechanics before accepting such an offer as part of a settlement.

But this approach could be used for both consumer and competition law breaches – for example, an unfair trading practice endemic in an industry could give rise to a compensation offer as part of an agreed set of Part 8 undertakings. We need to be creative and open to discussion on these alternative solutions.

So, to conclude, I hope that this talk has provoked you into thinking about how to get your clients the best outcomes when faced with competition and consumer enforcement action by the OFT or other public authorities acting in partnership with us.