



Private actions in competition law

THE UK'S OFFICE OF FAIR TRADING RECOMMENDS FURTHER STEPS TO ENCOURAGE PRIVATE LITIGATION

The UK Office of Fair Trading has recommended to the government a number of changes that would change the landscape of competition litigation in the UK to one where private actions can be pursued more easily, and with fewer associated risks, than has previously been the case. The recommendations, which are likely to form the basis of a future government consultation, will be regarded as good news for the emerging competition claimant bar in the UK, but perhaps less favourably by major businesses. These recommendations make a valuable contribution to the ongoing debate in Europe about how best to promote private enforcement.

The Office of Fair Trading (OFT) has published recommendations to the government that are likely to change the landscape of competition litigation in the UK. The changes will apply to:

- 'stand-alone' litigation relating to alleged infringements where regulators have not acted, as well as follow-on claims based on prior decisions of the OFT or the European Commission;
- litigation brought by businesses, as well as consumers; and
- claims relating to abuses of a dominant position, as well as unlawful agreements and practices that restrict competition – these will have implications beyond hardcore cartel infringements.

The proposals comprise a set of recommendations entitled 'Private actions in competition law: effective redress for consumers and business'. They aim at facilitating and incentivising claims, while at the same time trying to keep a balance within the system, and avoiding the emergence of a litigation culture. Emphasis is laid on the need to ensure fair, efficient and cost-effective resolution of disputes.

The recommendations follow on from an OFT consultation in April 2007 on private actions in competition law, to which we and others responded.

The OFT clearly sees private enforcement as an important complement to public enforcement, where policy objectives and resource constraints limit the number of full-scale investigations, decisions and penalties ultimately imposed against infringing companies. The

OFT's view is that these two enforcement mechanisms should act together to improve the effectiveness of the UK competition system and deliver the government's objectives for a world-class competition regime.

These recommendations are of interest to the business community outside the UK for two reasons. First, non-UK companies involved in cartels or other breaches of competition law may find their customers will be eager to try to bring actions in the UK should the OFT's recommendations be adopted by the government. Second, the recommendations will likely be scrutinised by the European Commission and the competition authorities in other EU member states and may, therefore, influence reform in this area beyond the UK.

Principal recommendations to government

The OFT's principal recommendations, which are intended to be included in a wider government consultation, are as follows:

- modifying existing procedures (or introducing new procedures) to allow representative bodies to bring stand-alone and follow-on representative actions for damages (and applications for injunctions) on behalf of consumers and businesses (currently representative actions can be brought only on behalf of named consumers in follow-on actions);
- permitting conditional fee arrangements (CFAs) in representative actions in certain circumstances to allow for an increase of greater than 100 per cent of lawyers' fees;

- enabling courts to cap parties' costs liabilities and to provide for the court to have discretion to give claimants protection from costs in appropriate cases;
- establishing a merits-based litigation fund; and
- providing protection from disclosure in litigation for leniency documents and some relief from damages liability to those who have blown the whistle on cartels (with the possibility of a complete exemption from liability in exceptional circumstances).

Overall, if adopted, these proposals will be regarded as good news for the emerging competition claimant bar in the UK, but perhaps less favourably by major businesses. US class action claimant firms have established in London recently with a view to taking advantage of proposed changes at European and national level in the context of competition litigation. The prospect of the proposed changes will likely only encourage the enthusiasm of these firms.

'Representative' actions – but not 'class' actions

The proposed representative actions appear to differ in certain key respects from US class actions (for example, there will be no jury trials and no treble damages and actions may be brought only by designated bodies or bodies given permission by the courts). In this way, the OFT hopes to ensure that only responsible bodies genuinely acting in the interest of consumers or businesses are given standing to bring representative actions.

However, the proposals do contemplate claims being brought on behalf of consumers, or businesses, in general – the so-called opt-out regime. Discretion might be given to the courts to enable claims to be brought for damages to be recovered for *unnamed* consumers or businesses (subject to court approval and/or supervision). The OFT does not, however, consider that there needs to be only one regime for representative actions. The recommendation is that the courts be allowed to determine whether a representative claim should be brought as an opt-out or an opt-in (where there are named claimants).

Similarly, if the calculation of compensatory damages is regarded as evidentially too complex or inefficient, the court may be given power to direct that damages would

be awarded on a restitutionary basis (ie based on the benefits gained by the wrongdoer from the breach, rather than the loss suffered by consumers or businesses). This is a timely proposal in light of the recent decision of the High Court in *Devenish Nutrition Limited v Sanofi-Aventis* [2007] EWHC 2394 finding that a restitutionary award is not an available remedy in competition claims.

The OFT expects that any government consultation will consider the procedures, criteria and filters required to ensure that, where a representative action of this nature is contemplated, the aims of fairness, efficiency and cost-effectiveness are achieved. This might involve introducing new pre-action procedures and a permission stage before representative actions can be brought. The OFT also advocates the exercise of active case management by judges, including in relation to costs.

Costs and litigation funding arrangements

As regards costs and funding arrangements, the OFT is recommending the allowance of CFAs of more than 100 per cent uplift for certain representative actions (100 per cent is the current cap). These and other funding arrangements should be subject to judicial supervision and could be reviewed, for example, at the permission stage.

A linked recommendation is that cost-capping, perhaps limited to representative actions, be introduced to ensure predictability and to ensure that well-founded claims are not deterred. The OFT's recommendations specifically refer to the possibility of capping the claimant's liability for the defendant's costs at zero, thereby providing cost-protection for a competition claimant from the risk of an order for costs that claimants generally face.

Further:

- the OFT proposes the establishment of a merits-based litigation fund (subject to financial modelling required to assess the viability of such a scheme). The fund would probably not finance all the costs and disbursements in a case but would be available to finance cases where third party funding was not a viable alternative. It appears that the fund would operate as a form of legal aid to support meritorious claims that might otherwise not be brought; and
- the OFT recommends encouraging third party funding for competition litigation.

Effect on whistle-blowers and leniency applicants

Some aspects of the OFT's proposals affect whistle-blowers and leniency applicants in hardcore cartel cases. In essence, the proposals are to protect from disclosure documents submitted under the leniency regime. The OFT also recommends that immunity recipients (ie those first through the door under a leniency programme) are protected from joint and several liability – so that they are liable only for the losses they caused – and that consideration be given to providing immunity recipients, in exceptional circumstances, with total immunity from civil liability in the UK.

Claims resolution

The OFT's paper also deals with effective claims resolution. The main points arising are:

- further consideration is needed before county courts are given jurisdiction over competition claims;
- the idea of introducing a competition ombudsman scheme to encourage alternative dispute resolution of competition claims is to be kept under review, rather than included in any government consultation document at this stage; and
- the OFT will continue to assess whether, in the context of its administrative settlement of cases, undertakings should be encouraged to provide redress to those who have suffered loss due to competition infringements.

There are a number of matters that the OFT considered best dealt with at European Commission level or on an EU-wide basis, including the status of decisions of other EU national competition authorities before the English courts and questions relating to the pass through of loss in compensatory damages claims. By contrast, it has recommended that UK courts and tribunals should be required to 'have regard to' all UK competition authority decisions and guidance to promote consistency and coherence.

Next steps

The Treasury's Pre-Budget Report stated that the government intends to consult on how best to reduce the barriers to private enforcement. The OFT's recommendations are designed to feed into this

consultation. If implemented, these reforms are likely to lead to a significant increase in competition litigation and heighten the risk of significant exposure for business resulting from competition infringement.

The OFT will be mindful of these recommendations when responding to the European Commission's forthcoming White Paper on damages actions for breach of competition laws at European level.

For further information please contact	Jon Lawrence
	T +44 20 7832 7692
	F +44 20 7108 7692
	E jon.lawrence@freshfields.com