Private Actions in Competition Law: Effective Redress for Consumers and Business ("the OFT Paper")

COMPETITION LAW ASSOCIATION CONSULTATION RESPONSE
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1. Introductory points:

a) There is currently an "enforcement gap" in the realm of competition law between public and private enforcement. This affects, in particular, but not exclusively, small and medium enterprises ("SMEs") and private individuals.

b) This gap is seen as getting worse as a result of the perception, confirmed by the OFT in a variety of public fora, that the OFT is beginning fewer investigations, taking fewer decisions and concentrating on certain limited types of cases (on the basis of precedent value, priority sector or turnover sums involved).[1]

c) Private enforcement is not able to fill this gap, particularly for SMEs and private individuals:

i) Bringing a competition case before the non-specialist courts in the UK is still perceived as a high risk strategy due to: the unfamiliarity of a non-specialist bench with a complex and novel area of law; the high costs that are incurred during the early phases of the pleadings/disclosure process; the ability of defendants to raise technical issues in a novel field.

ii) Cartels, in particular, are very difficult to crack from an evidential perspective. Ordinary civil court disclosure processes are unlikely to secure the evidence required, absent a

[1] For example, the OFT has confirmed that it now has only some 15 "live" CA98 cases, down from about 60 three years ago.

strong evidential starting point. In contrast, the OFT was afforded strong enforcement powers backed by criminal sanction by Parliament for this purpose, and it is necessary for the OFT to use them.

iii) The amendments made to CA1998 by the Enterprise Act 2002 emphasised the relationship between public and private enforcement. The policy underlying those amendments will be undermined if the OFT and the sectoral regulators do not adopt an active enforcement policy leading to decisions that can be relied on by private parties in "follow on" litigation.

iv) Moreover, in abuse of dominance cases, the practical difficulties and risks are frequently not the result of any uncertainty in the law but due to disputed facts regarding such issues as market definition, determination of costs, etc. which consumers and SMEs are poorly equipped to provide and for which expert evidence is very expensive.

d) To the extent that the role of private enforcement can be increased otherwise than by "follow on" litigation, it appears to us that the single most productive step in resolving "accessibility issues" would be to increase the role of the CAT by, in particular, bringing into force EA sect 16 so as to give it an originating jurisdiction to hear private infringement cases.

2. Follow-on claims

a) The problems for follow-on actions are far less important than stand alone actions; cases are being brought but have relatively low profiles as they usually settle. If the OFT wishes to encourage "effective redress for consumers and [in particular small] business", this is the most likely route to that objective.

b) However, a simple but nonetheless important point (upon which the OFT's discussion paper is silent), is that such claims need infringement decisions taken by regulators from which to "follow-on". The OFT's role in this regard is therefore crucial.

c) Some relevant points for the OFT's role in the "follow-on" process include:

i) The need for clearly written infringement decisions, with findings of fact set out in unambiguous terms;

ii) Clarification at the judicial/Executive level as to the "footprint"[2] of the original OFT decision;

iii) Careful consideration of the effects of greater moves to "settle" infringement inquiries in light of the above considerations;

iv) As regards representative/consumer class actions, involving disparate/small scale losses, useful parallels may be drawn from the use (benefits and issues) of collecting societies in IPR, such as: accountability; inefficiency; "principal-agent problem"; and the use of the same for the division of unused funds;

v) As a note of caution, the OFT should be aware of the boundaries of its own role in the scheme of enforcement; in particular, any attempt on the OFT's part to deal with compensatory issues as an aspect of leniency or settlement appears questionable. The benefit of leniency should be the avoidance of administrative sanction, and should not trespass upon the rights of victims to seek full compensation directly, or indirectly though a consumer organisation, in the courts.

3. Comp law defences

[2] i.e. the extent to which findings in the original decision will be binding upon the subsequent court.

a) These are raised, and will continue to be raised, by parties before the courts.

b) We question whether the OFT needs to comment upon them or seek to guide their field of application.

4. Standalone claims:

a) These are subject to massive disincentives (*Arkin*, *Crehan*), absent legal aid, for reasons including: costs; including specialist lawyers and the scope for expert evidence in untested areas; scale and cost of disclosure *(Generic drugs*); unfamiliarity of court and therefore length of trial.

b) There seems little prospect of adoption of the measures listed at section 5 of the OFT Paper (CFAs, cost capping etc) – which derive from and apply to litigation procedure as a whole - as some form of "special exception" that the regular courts (as distinct from the CAT) are asked to apply just to competition law cases. The benefits they would achieve are in any event limited.

c) As noted above, the single most efficient away of reducing the barriers to stand alone claims would appear to be to enlarge the jurisdiction of the CAT to hear such cases through implementing section 16 EA02:

i) The "uncertainty" disincentive would be reduced: the CAT is a specialist body, familiar with the relevant case law and its underlying principles, whilst the availability of expert "wing-members" reduces the scope for unnecessary expert testimony;

ii) The CAT has demonstrated willingness to apply its procedural powers in respect of disclosure, costs and witness evidence in a flexible manner, which could provide solutions to some of the issues raised by the OFT at section 5 of its paper;

iii) The prospect for the development of a coherent body of competition law jurisprudence in the UK in an efficient manner is increased if the CAT were primarily responsible for hearing both CA98 appeals and private stand-alone actions, in contrast to a broad spread of non-specialist judges coming into contact with the relevant Community authorities and underlying economic principles on, at best, an intermittent basis.

5. Representative actions

a) A degree of caution is suggested over any proposal to introduce "opt out" private class actions, particularly if combined with reform to CFA arrangements (to give a model similar to that seen in the US);

b) The sensible median would seem to persist with the "representative" action model, limited to a controlled group of consumer representatives. Scope could be given to consideration of "opt out" actions for cases brought by such bodies; for example, the *Football Kits* follow on action, based upon Court of Appeal authority, raises a number of issues relevant to this point and, in particular, the extent to which section 47A(1)(b) and section 47B are intended to permit the CAT to take account of the impact of a cartel on the entire relevant consumer class in assessing the correct measure of damages in a follow on action. Again, useful analogies may be drawn from the IPR field.

c) The over-cautious approach of the OFT to disclosure of the evidence on its file in such cases creates difficulties for the representative or section 47B consumer claimants. There is no reason for the OFT to refuse to disclose relevant information in its possession (which may be highly relevant to the initial formulation of a claim or an assessment of its merits) unless or until the CAT has refused to order disclosure from the defendant or third parties.

6. The interface between public and private enforcement:

a) There are a number of unfortunate precedents where delay/steps taken by the OFT have served to hinder private enforcement. This highlights the need for the OFT to act expeditiously, and enter into dialogue with potential complainants.

b) Interim relief is often crucial, especially for small claimants in Chapter II cases involving exclusionary conduct. (eg Healthcare at Home (*Genzyme*); Link *(Napp)*; Burgess *(Harwood Park)*). It is doubtful that any of these would have started standalone private proceedings. However, if a smaller claimant should nonetheless feel able to incur the risk and costs of a standalone application, the failure by the OFT to act at the interim relief stage (whether through reasons of administrative resource or otherwise), is likely to cause prejudice to the claimant in such an application unless the OFT quickly declines to order interim measures and makes clear that this is on resource grounds only.

c) We agree that an effective enforcement regime requires the OFT to be able to "drop" investigations where, on grounds of policy/resource, it is of the view that its time its better spent else where. However, the difficulty for complainants in such circumstances is that (i) the nature of the alleged complaint or "infringer" (i.e. deep pockets or a dominant undertaking) is such that it requires the OFT's statutory enforcement powers to expose the conduct (otherwise the complainant would usually have brought a private action themselves) and (ii) "dropping" the case in such circumstances means the work done by the OFT is, effectively, lost. We question whether private enforcement might not be well served by the OFT reviewing its disclosure policy in such circumstances to facilitate a private action if (i) the merits of the case and (ii) a court, having heard from the defendant, were of the view this were justified:

   i) In the first instance, this might be done simply through ensuring that the file closure letter were written in sufficient detail to

permit the court to review the available evidence (whether through a "confidentiality ring" or otherwise);

ii) The OFT would be free, from a policy perspective, to state whether it supported, objected or was neutral to the matter being taken up in private proceedings;

iii) If the court were so minded, the OFT could assist the disclosure hearing, whether though providing a summary of the evidence gathered (on a confidential or non-confidential basis) and/or making representations as the court/OFT deemed appropriate;

iv) Such a measure would have the benefit of ensuring evidence gathered using the OFT's unique enforcement powers was not lost and render the OFT less likely to face *Claymore*/*Bettercare*/*Cityhook* type challenges where it took the decision to close investigations on resource grounds. In turn, the reduction of such challenges should leave the OFT with greater flexibility to open section 25 investigations in the first place.

v) The disclosure hearing would, of course, be conducted so as to preserve the rights/balance of interest of the defendant from the perpetuation of misguided inquiry.

vi) This opens the question of whether an amendment to Part 9 of the Enterprise Act 2002 would be required, in a similar way to the enactment of s241A by the Companies Act 2006. (For further details, see the DTI consultation paper on the introduction of secondary legislation to allow disclosure to intellectual property owners to increase private (rather than public) enforcement of intellectual property law).[3]

[3] See: http://www.dti.gov.uk/files/file35920.pdf.

d) Competition ombudsman: whilst greater clarity might be given as to the detail of the proposal, it seems to us that there may be some merit in giving this proposal greater consideration. A role is seen for such an office in: (i) providing an initial view on cases, which in turn might assist a court (ii) conducting an initial request for relevant documents from parties which, even if conducted on a voluntary basis, might be of assistance in some cases. This could be analogous to the role of the UK Intellectual Property Office in providing opinions on patent validity or infringement.[4] However, an Ombudsman would appear to be of little assistance in the "hard core" secret cartel cases which, again, require the investigative powers of the OFT to make progress with. It appears to us that alternative dispute resolution may offer an additional and fertile way of dealing with complex disputes, given that the parties to competition law litigation will frequently have a common interest in avoiding the costs and uncertainties of bringing a case to trial.

7. Policy and precedent:

a) Without questioning the role of the OFT in implementing competition law policy in the UK and, in particular, ensuring that relevant legal principles established by the courts are disseminated effectively, we question the need for OFT guidelines to be given "section 60(3) status" before the UK courts as suggested at section 8 of the OFT Paper. UK courts will give due weight and regard to such guidance, but should and will apply relevant legal principle directly for themselves.

b) We were very surprised to learn that an argument that had been expressed against giving the CAT jurisdiction to hear standalone claims was that if such actions were heard by non-specialist courts, the judges there would be more likely to follow OFT guidelines. Even if correct, we do not consider that is an appropriate argument, and the CAT will in any event continue to hear follow-on actions. Nor should

[4] See http://www.ipo.gov.uk/patent/p-other/p-object/p-object-opinion.htm.

there be any concern that the CAT will somehow adopt a broader policy making role: it acts as a court to decide cases according to the law within the wider court system.

c) The time is not right to accord precedent status to decisions of other member state NCAs. In any event, such a proposal would raise practical concerns related to Article 6 ECHR as to whether due process was respected by the NCA concerned to a standard required in the UK (see *Napp* etc).

8. Conclusions:

a) The primary issue is the need to ensure that the OFT investigates and enforces the "difficult" cases, including those concerning smaller market sectors and outside of "priority" areas. Private enforcement cannot and will not fill that gap;

b) However, to the extent that practical steps might be taken to improve private enforcement, the most obvious step would appear to be to expand the jurisdiction of the CAT to hear stand alone actions, whilst permitting the CAT to continue to apply its own procedural rules in a flexible manner to address the specific problems that private actions in the realm of competition law engender.

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