



**VIEWPOINT:**

**THE OFFICE OF FAIR TRADING AND PRIVATE ANTITRUST  
LITIGATION**

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**The Office of Fair Trading and Private Antitrust Litigation**

by

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The UK Office of Fair Trading (“OFT”) has issued a discussion paper on proposals to make redress for consumers and business for breaches of competition law more effective. It wants to facilitate private actions to enforce competition law in support of public enforcement by regulators but do so without giving rise to a “litigation culture.” The consultation notes that the main structures for effective private actions in competition law are already in place in the UK. The options aired in the paper are aimed, therefore, at improving the existing system.

In particular, the OFT focuses on the practical barriers which have, to date, made consumers and small and medium-sized businesses reluctant to bring actions to seek compensation. The proposals are intended to allow consumers and businesses suffering losses as a result of breaches of competition law to recover compensation, both in claims for damages on a standalone basis and in follow-on cases brought after public enforcement actions.

Among the options considered by the discussion paper are the following:

- Allowing designated bodies, or bodies granted permission by the courts, to bring standalone representative actions on behalf of consumers and giving representative bodies the power to bring follow-on and standalone actions on behalf of businesses in the ordinary courts. Currently, representative actions can only be brought in the Competition Appeal Tribunal on behalf of consumers after an infringement decision has been made by the OFT or the European Commission.

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- Bodies that might be interested in obtaining permission for a particular case or cases could include central or local government purchasing agencies or groups, such as those whose members have suffered from the operation of cartels in the construction sector, and representative trade groups.
- Allowing representative actions to be brought on behalf of consumers at large, alternatively by named consumers (the first option is similar to the US “opt-out” form of class action).
- Alternative funding arrangements, including amending the current conditional fee system to allow a percentage increase of more than 100 percent for a successful case.
- The use of costs-capping orders at an early stage of the proceedings to limit claimants’ exposure to costs orders in the event that they lose the case.
- Making infringement decisions by other European national competition authorities on breaches of EC competition law binding on national courts in Europe or, alternatively, on a reciprocal basis.
- Shifting the burden of proof in relation to the “pass-on” defense from claimants to defendants. The claimant must prove that it has suffered loss. The defendant would then be required to prove that the claimant mitigated the loss by passing on the whole or part of the overcharge to its customers.
- Methods to ensure that cases are only brought to court and to trial when they cannot be resolved by other means. It considers the early exchange of information between prospective parties to proceedings, for example, through the development of a competition pre-action protocol. It also considers the development of a Competition Ombudsman akin to the Financial Ombudsman Service.
- Provisions enabling the OFT to require undertakings to provide redress as part of its administrative process.
- In a proposal that might actually restrict private actions, bolstering the current leniency regime to relieve a recipient of immunity from its joint and several liability to private claimants.
- Enabling lower-value private actions to be dealt with in county courts.

The OFT's paper notes that the UK's documentary disclosure regime avoids the "information asymmetry" characteristic of private action regimes in other EU member states and makes no significant proposals in this respect.

These proposals cannot be considered in isolation. For example, a combination of higher conditional fees, an opt-out model for representative actions and capped costs would bring antitrust litigation in the UK perilously close to the US system.

The outcome of this consultation will be heavily influenced by the European Commission's White Paper on Damages Actions for Breach of EC Antitrust Rules, due to be published later this year.

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