



eSAPIENCE CENTER FOR COMPETITION POLICY

**VIEWPOINT:**

**THE OFT DISCUSSION PAPER – PRIVATE ACTIONS IN  
COMPETITION LAW: EFFECTIVE REDRESS FOR CONSUMERS  
AND BUSINESSES**

**Emanuela Lecchi**

**An eCCP Publication**

**May 2007**

© 2007 Emanuela Lecchi. Published with permission by eCCP.

**The OFT Discussion Paper – Private Actions In Competition Law:  
Effective Redress For Consumers And Businesses**

**By**

**Emanuela Lecchi\***

As regulators and competition authorities are never tired to tell us, “*A healthy competitive market place guarantees the best possible deal for European consumers and businesses alike.*” (Neelie Kroes speech before the European Parliament in November 2004, when she was nominated to be the European Commissioner for Competition). The question is how to turn competition law and theory into an effective tool that will directly benefit consumers and businesses?

Private actions are seen as key, but of course there are difficulties and the European Commission kick-started the discussion process in December 2005 with its Green Paper on damages actions. Sixteen months later, the Office of Fair Trading (OFT) has published its thoughts for discussion in the UK forum.

The OFT’s discussion paper is very clear in its scope and deals with a number of important issues, including the effectiveness of individual actions compared to representative actions, the interaction between private and public enforcement and ways of reducing time and costs for bringing private claims. Some of us may be excused for wishing to see a discussion paper perhaps a bit more detailed on proposals for significant changes to encourage fair use of competition rules in litigation.

---

\* Emanuela Lecchi is the Head of Competition & Regulation and a Partner at Charles Russell LLP.

Although this is obviously a paper intended for further discussion, it seems already clear that some issues are approached cautiously. It seems fairly clear that the OFT sees the model of “class actions” with suspicion, and even the possible widening of currently available representative actions, to encompass, for example, stand-alone actions, as well as follow-on actions, is approached with care. On the other hand, the paper provides helpful discussions on increasing the incentives for individuals to bring individual claims. One of the main points is how to make the litigation procedure more “user-friendly” to those people bringing novel and risky claims. There are inherent risks when bringing claims under new grounds, such as a breach of competition rules. There are objective difficulties in obtaining evidence of competition infringements, reflected by the OFT’s strong investigative powers. Aggrieved individuals and companies do not have access to these resources. The OFT indicates that claimants’ exposure to high costs should be mitigated, and one possible suggestion is to increase the 100% surcharge limit in no-win, no-fee arrangements, and determining caps on fees recoverable by defendants early into the proceedings may not be the most appropriate way forward.

The OFT’s proposals would encourage claimants who, at the outset of litigation, are not certain whether they have a robust claim. There is a risk, however, that these proposals could be abused by vexatious litigants with access to funding and who could then be shielded from paying the defendant’s full costs if they lose.

The discussion paper contains a number of suggestions which no doubt will be debated and considered in the coming months – the debate is clearly outside the scope of this article. We wish to draw attention to one specific point, however, relating to the

interaction between private and public enforcement. Private enforcement will, of course, work alongside the OFT's very important role as the UK's public enforcement body. In the paper, the OFT makes the point that public and private enforcement are complementary and cites the *Hasbro/Argos/Littlewoods* and *Replica Football Kit* cases as examples where consumers could piggy-back off the OFT's finding of infringement with a "follow-on action." However, the *Replica Football Kit* case also demonstrates the difficulties that exist when translating OFT decisions into damages for consumers. The Consumers' Association is now attempting to bring an action on behalf of those persons that can prove that they bought a replica football shirt from an infringing party in 2000 or 2001. With the passage of time, the number of consumers that can demonstrate that they bought a shirt will decrease. The discussion paper could have usefully addressed points arising from the coordination between public and private enforcement – if the victims have to wait until the determination of a public enforcement action by the OFT (or the European Commission) then the effectiveness of private actions as a deterrent would decrease. Perhaps an analogy could be made with the criminal rules which see parallel cases being brought for civil liability by the victims of a crime, alongside the criminal prosecution.

The debate is open – we have until 13 June to make our views known to the OFT.