



eSAPIENCE CENTER FOR COMPETITION POLICY

VIEWPOINT:

OFT DISCUSSION PAPER ON PRIVATE ENFORCEMENT

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OFT Discussion Paper on Private Enforcement

By

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The UK Office of Fair Trading's (OFT) Discussion Paper on private actions (published on 18 April 2007) follows the European Commission's Green Paper initiative with an emphasis on consumer actions.

Whilst there are a number of sensible proposals adopted in the paper, there are other areas where it is questionable whether the approach is either necessary or desirable. As a competition litigator, I have a great interest in ensuring that this area of law develops since so much is still uncertain. What we need is a body of case law which will set out the parameters and procedures for resolution of private actions in the courts. But it is doubtful that the proposed proliferation of actions and tribunals will generate the clarity and focus which is required.

I deal first with the proposals which seem sensible and then with those which need greater thought.

The UK already has a legal framework in place to deal with many of the issues which concern the European Commission in relation to civil law jurisdictions such as disclosure, awards of costs to the winner and a clear history of awarding damages for loss suffered. It is therefore welcome to see that the OFT is not proposing a wholesale change in the UK's approach to private enforcement in anti-trust litigation. Various proposals are both sensible and welcome, such as:

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- There is no reference to the European Commission's debate about double or triple damages. Philip Collins has made it clear that he wants the proposals to avoid US-style litigation.
- As to the passing-on defense, the OFT suggests that a Claimant should be required to prove loss and that the burden of proving that a Claimant has "passed on" the loss to customers should lie with the Defendant. This should ensure that a fair and reasonable solution is reached without undermining fundamental legal principles that damages should constitute compensation for loss suffered.
- The OFT proposes ensuring that leniency documents are not discoverable without the consent of the leniency applicant. This is a sensible means of ensuring the effectiveness of leniency applications.

The areas which concern me and are less likely to be welcome to the business community involve the encouragement of representative actions and the creation of several different tribunals in which competition litigation cases can be heard.

- The OFT proposes that designated bodies be allowed to bring stand alone representative actions on behalf of consumers and both follow-on and stand alone representative actions on behalf of businesses, thereby expanding the existing representative actions currently available before the Competition Appeal Tribunal (CAT). It would be better to allow representative actions to go through the CAT (which is already fully equipped to hear such claims) before seeking to amend and expand representative actions. This is particularly true now that the first representative damages claim has just been commenced in the CAT which will give

it the opportunity to provide useful guidance on representative actions. To seek to expand and amend this area before the first representative action goes through seems to be premature.

- The OFT also proposes that lower-value private actions should proceed before the County Courts and that there should be a Competition Ombudsman whose recommendation would have no binding force until either the parties agree to accept it or proceedings are commenced in the courts. This is likely to slow down resolution of cases and would expand the number of tribunals able to hear antitrust claims and run the risk of inconsistent decisions. This seems to be counterintuitive as all the efforts to date have been to ensure that these highly complex claims are heard by specialist judges.
- Why is the OFT paper silent about the CAT which was set up as a specialist competition tribunal but still only hears follow-on actions rather than stand alone claims? The very area in which the CAT has the greatest expertise (determining whether there has been a breach of competition law) is denied to the CAT which has to concentrate its efforts on reviewing the decisions of the OFT and the European Commission with a view to determining the (non-competition) issues such as loss and causation which arise in follow-on actions.

Surely it would be better to encourage the focusing of these highly complex claims before specialist tribunals with a view to ensuring that we get some substantive case law on all the many open issues which have not yet been resolved. This would be the best

way of encouraging sensible resolution of competition disputes rather than seeking to expand the number of types of claim and tribunal.

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