UK Proposals to Increase Private Enforcement of Competition Law

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On 24 April 2012, the United Kingdom's Department for Business, Innovation & Skills published a 70-page document entitled Private Actions in Competition Law: A Consultation on Options for Reform (the Consultation) (available at www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation).

The Consultation contains some far-reaching ideas. If many or all are implemented, it could greatly increase private enforcement of competition law in the UK. In particular, the Consultation discusses:

- Introducing an "opt-out" collective action for damages; under this collective action, the Competition Appeal Tribunal (CAT) would assess damages for a represented group of claimants, which would be bound by the outcome unless they affirmatively opt-out of the action, but claimants could come forward after the damages' award to claim their share.
- Preserving the incentives for whistleblowers to inform competition authorities about cartels by legislating to: (i) protect leniency applications from disclosure in damages claims; and (ii) absolve an amnesty applicant from joint and several liability for all the damage caused by a cartel.
- Widening the specialist CAT's powers to allow it to (i) rule more generally on claims for damages (and not only on claims following from an earlier finding of an infringement by a competition authority); and (ii) grant injunctions.
- Encouraging alternative dispute resolution (ADR) and enabling the Office of Fair Trading (OFT) to require that companies found to have infringed competition law compensate victims of their behaviour.

The Government's consultation period for the proposal runs until 24 July 2012.

An Opt-out Collective Action

The most radical proposal is an "opt-out" collective action before the CAT.[1] Currently, UK law only allows collective claims for damages in the form of "opt-in" follow-on claims on behalf of consumers. Under the current rules, claimants must opt-in to the procedure and actually be named on the claim form. Moreover, the procedure only applies when a competition authority has already

ruled that a company has infringed competition law. And it only applies to consumers. The Consultation argues that these conditions are too restrictive and notes that in almost 10 years, there has been only one collective action case. (That was an action brought by Which? following the OFT's decision fining a sport equipment retailer, JJB Sports, UK £6.7 million for fixing prices of replica football shirts, where only 130 claimants (estimated to be only 0.1% of the affected consumers) joined the action and each received UK £20 to compensate for the estimated mark-up.)

The proposed opt-out system would allow both businesses and consumers to participate in collective actions. These actions could be brought on a stand-alone basis, rather than limited to cases where a competition authority has already found a breach of competition law. For a stand-alone claim, the claimant would have to establish that competition law has been infringed and proof of loss. The CAT, which would be the only court competent to hear these claims, would assess damages based on an estimate of the total size of the consumer group potentially affected by the illegal conduct. If this change is implemented, it will greatly increase defendants' exposure to damages in the UK.

The Government is wary of promoting a "litigation culture", but believes that its proposal builds in enough safeguards to protect defendants. In particular, it proposes that:

- The opt-out collective action would be limited to competition law infringements.
- Only actual, and not punitive or treble damages, would be awarded.
- The existing "loser pays" rule, which requires unsuccessful claimants to cover the defendants' costs, would be retained.
- The CAT, as a specialised competition law tribunal, would enjoy exclusive jurisdiction over the action.
- The CAT would have to certify that the individual or body bringing the claim is suitable and sufficiently representative of the class of claimants (this would normally exclude law firms and third party funders from bringing an action).
- Lawyers would be prohibited from charging contingency fees, under which they take a percentage of the damages; lawyers could, however, charge conditional "no win no fee" fees and receive an increased fee if the case is successful.

Clearly this is all very controversial.

Protecting Whistleblowers and the Amnesty/Leniency Regimes

The Consultation recognises that vigorous private enforcement could alter potential whistleblowers' incentives when considering applying for leniency to the OFT or the European Commission. It emphasises the importance of public enforcement of competition law and the central role of leniency applicants in bringing cartels to the attention of authorities. To preserve whistleblowers' incentives, the Consultation suggests two important reforms.

- First, mainly in response to the European Court of Justice's 2011 *Pfleiderer* judgment (Case C-360/09, Judgment of 14 June 2011), the Government discusses legislating to protect documents prepared exclusively for an amnesty/leniency application from disclosure in private damages litigation. In *Pfleiderer*, the European Court of Justice ruled that Member State courts must balance the public interest in disclosing to claimants documents submitted by a leniency applicant in a public enforcement procedure (in that case to the German Competition Authority), thereby possibly enabling claimants to substantiate claims for damages, against the need to protect the effectiveness of and incentives offered to applicants under leniency programmes.[2] The Consultation notes that the European Commission may also legislate to prevent disclosure of leniency documents but emphasises that, if the opt-out collective action regime is implemented in the UK, such legislation would be needed urgently. Beyond its immediate effects in the EU, legislation by the UK or the EU to protect leniency documents might also help defeat attempts by the plaintiff bar to obtain disclosure in third countries (most importantly in the US), although it will be for those countries' courts to consider what deference should be granted to EU or UK legislation.

- Second, the Consultation proposes that the liability of leniency applicants be limited to damages directly caused by their conduct. They would no longer be jointly and severally liable for all damage caused by the cartel. This proposal may appear quite radical, but it is in line with the US ACPERA legislation (which does away with joint and several liability for immunity applicants and limits their liability to single damages, provided they cooperate with plaintiffs' efforts to sue other cartel participants).

Expanded Jurisdiction for the CAT

The CAT is a specialist competition court with an established good reputation. To date, however, its jurisdiction has been limited to follow-on damages claims (after a competition authority has found illegal conduct). The Government proposes to expand this jurisdiction to allow the CAT to rule generally on claims for damages, whether or not a competition authority has already found illegal conduct. In addition, the Consultation suggests enabling the transfer of cases (or parts of cases) with competition law aspects from the High Court (or Scotland's Court of Session) to the CAT.

The Consultation also seeks views on two important evidentiary aspects of private competition law enforcement:

- First, it proposes introducing a statutory rebuttable presumption that cartels raise prices by a fixed amount, which is currently suggested at 20%. Either the claimant or the defendant could rebut this presumption with economic evidence. While the Consultation considers that this presumption will encourage consumers to bring cases, the underlying premise that cartels normally increase prices by anything like 20% is highly controversial and eminently questionable. The prevailing view among economists is that there is no solid evidentiary support for such a presumption.

- Second, the Consultation considers, but ultimately rejects, legislating to allow explicitly the passing-on defence under which defendants can argue that the claimant passed on the entirety of the cartel overcharge to an indirect purchaser. The Consultation recalls that courts have not yet definitively decided if this defence is part of English law, yet it expresses the view that there is no reason based on legal principle for it not to be. The Consultation also notes that it might be more appropriate to address this issue at the proper EU level.

The Consultation also proposes that the CAT have power to grant injunctive relief, which it currently lacks. As the Consultation recognises, in particular for small and medium enterprises (SMEs) claimants, injunctions can be just as important a tool for private enforcement as the possibility of damages.

The Consultation considers the possibility of a cheaper, quicker and simpler fast-track procedure for SMEs. The Consultation observes that the details would still largely need to be determined, but it suggests that both the claimants' potential damages and their liability for costs in case of failure would be capped.

ADR and Potential OFT Role in Ordering Compensation

The Consultation considers whether ADR should be mandatory before a claimant pursues private litigation, but rejects this. It does, however, put forward some ideas on how the CAT could encourage ADR; these include facilitating a formal collective settlement (such a procedure already exists in Dutch law).

The Government also considers giving the OFT discretionary power to oblige companies to compensate victims of their anti-competitive conduct. This power would only be used if the OFT had already concluded that the company had behaved illegally. The OFT would not quantify individual losses, but might define the types of loss that could be compensated and direct how compensation might be calculated; the company would then have to apply the OFT's guidance to individual cases. Rather than waiting for the OFT to impose a compensation scheme, companies could voluntarily agree to compensate and the Consultation suggests that in certain–unspecified–situations voluntary compensation might be a mitigating factor warranting a "modest" (five to 10 percent) fine reduction.

Next Steps

The Consultation period is open to 24 July 2012. The Government will publish all responses online and, within three months of 24 July, publish its conclusions based on these responses. Many of the proposals, if they are ultimately retained, will need either primary or secondary legislation before becoming law.

[1] The European Commission carried out a consultation on collective redress in 2011; see Towards a Coherent European Approach on Collective Redress available at ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html. The Commission is apparently considering what follow-on proposals to make.

[2] See also *National Grid*, in which the English High Court applied the principles of *Pfleiderer* to leniency documents submitted to the European Commission, Claim HC08C03243, *National Grid Electricity Transmission plc v ABB Ltd and others*, judgment of 4 April 2012.

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