

**Response to the
European
Commission's
Green Paper,
Damages actions
for breach of the
EC antitrust rules**

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1 INTRODUCTION

- 1.1 This paper sets out the views of the Office of Fair Trading (OFT) on certain policy options identified in the Green Paper, *Damages actions for breach of the EC antitrust rules* (the 'Green Paper'), and the Commission Staff Working Paper, *Annex to the Green Paper, Damages actions for breach of the EC antitrust rules* (the 'Working Paper')¹ which concern or affect the public enforcement work of the OFT. These views complement and supplement those submitted by HM Government.

¹ COM(2005) 672 final, 19 December 2005.

2 PRELIMINARY REMARKS

- 2.1 The OFT welcomes the publication of the Green Paper/Working Paper and the debate which it has generated. The OFT also looks forward to taking part in further discussions among the Commission, the Member States and other stakeholders. As the Commission is aware, discussions on private enforcement are also under way in the International Competition Network.
- 2.2 At this stage, the OFT is not in favour of the Commission adopting binding measures at Community level.² It believes that it would be sufficient for the Commission to publish a summary of conclusions intended to inform and support advocacy efforts in the Member States. Several of the policy options set out in the Green Paper simply reflect features of the legal systems in a number of Member States.

² In particular, the OFT would not be in favour of amendments to *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* as interpreted by the Community Courts.

3 COORDINATION OF PUBLIC AND PRIVATE ENFORCEMENT

3.1 Question J of the Green Paper/Working Paper deals with coordination of public and private enforcement. The OFT welcomes the statement in the Working Paper that,

'A strengthening of damages actions for infringement of competition law does not in any way signify less public enforcement by competition authorities',

and has set out its further thoughts on the various policy options below.

The policy options identified in the Green Paper/Working Paper

3.2 With regard to leniency, the Green Paper/Working Paper puts forward three policy options:

'Option 28 - Exclusion of discoverability of the leniency application, thus protecting the confidentiality of submissions made to the competition authority as part of leniency applications.

Option 29 - Conditional rebate on any damages claim against the leniency applicant; the claims against other infringers – who are jointly and severally liable for the entire damage - remain unchanged.

Option 30 - Removal of joint liability from the leniency applicant, thus limiting the applicant's exposure to damages. One possible solution would be to limit the liability of the leniency applicant to the share of the damages corresponding to the applicant's share in the cartelised market.'

General remarks

3.3 The OFT believes that leniency is an essential tool in the investigation of cartels. It agrees with the suggestion in the Green Paper that making it easier to bring private actions must not result in undertakings being discouraged from applying for leniency. If that were to happen, it is likely

that a smaller proportion of cartels would be uncovered – this would further reduce the likelihood of private actions, as there would be fewer decisions of competition authorities from which potential claimants could 'follow-on'.

- 3.4 In preparing this response, the OFT's starting point has been that, in applying for leniency, undertakings should not place themselves in a position which is worse than that of the other members of the cartel.³ Similarly, the OFT believes that a successful application for leniency should not, so far as possible, confer **advantages** in litigation that would not have been obtained but for the leniency application – third party rights should not be reduced.⁴ Any reduction in the incentives for a potential claimant to bring a case will have obvious adverse effects on the likelihood of private actions.

Option 28

- 3.5 The Working Paper appears to use the terms 'discoverability' and 'disclosure' more or less interchangeably. Either term could be taken to refer to one or both of two separate actions: first, the provision of a list of documents by the person from whom 'discovery' or 'disclosure' is sought and, second, provision of access to the documents themselves. For the sake of clarity, the terms 'listing' and 'access' are used in the following paragraphs.

³ This is consistent with the draft amendment of the 2002 *Commission Notice on immunity from fines and reduction of fines in cartel cases*.

⁴ If double damages for horizontal cartels were to be introduced, there would be a strong case for de-doubling of damages for the leniency applicant. See the comments on the availability of exemplary damages as against a leniency applicant at paragraph 4.3 below.

3.6 Where a competition authority has not yet published or otherwise made available its decision in connection with a given investigation, a claimant may wish to seek access to any documents created for inclusion in or to support an undertaking's leniency application (together, 'leniency documents'). Such documents may be in the possession of the (potential) defendant or a competition authority.

3.7 The OFT believes that, in order to maintain the effectiveness of the leniency regime, a claimant should not be allowed access to the leniency documents in the circumstances described above.⁵ Although it could be argued that access should be granted where the competition authority has decided not to pursue the case on, for example, grounds of administrative priority, the OFT believes that this would discourage leniency applications – whether a competition authority pursues a case following a leniency application is largely outside the control of the leniency applicant. Precisely how this should be achieved is an open question – any measures to prevent leniency applications being used against the leniency applicant will need to be accommodated within the existing rules. The OFT would, of course, be required to comply with any court order requiring access.

3.8 The OFT agrees with the suggestion in the Working Paper that,

'It might ... be necessary to exclude not only the actual corporate statement but also to disallow that a claimant seeks through disclosure the documents in the form submitted by the leniency applicant to a competition authority',

but subject to the modifications suggested below.

⁵ Although undertakings can make leniency applications orally to protect confidentiality (as the Working Paper acknowledges), this has disadvantages in terms of cost and complexity.

- 3.9 The OFT believes that the proposed exclusion should not just cover the national equivalents of the 'corporate statement', but also all material created for inclusion in or to support an undertaking's leniency application (that is, 'leniency documents' as defined at paragraph 3.6 above). Such material could include, for example, transcripts of interviews and witness statements. Leniency applicants would place themselves in a position worse than that of the other members of the cartel if such material were not covered by the exclusion.
- 3.10 Where leniency documents are released to the other infringing undertakings to enable them to exercise their rights of defence, restrictions must be placed on the use to which those documents can be put.⁶ The OFT understands that there has been at least one instance of a claimant obtaining from an infringing undertaking a copy of the corporate statement submitted to the European Commission as part of a leniency application and seeking to rely on it against the Commission's leniency applicant in a private action in another jurisdiction (the United States). However, there may be circumstances in which the **leniency applicant** would be prepared to grant access to leniency documents (for example, where the claimant agrees to use the leniency documents against other cartelists only). The OFT believes that the leniency applicant should be permitted to waive his rights in whole or in part, if he considers that it is in his interest to do so.
- 3.11 The OFT believes that a distinction should be drawn between (i) leniency documents; and (ii) documents created for any other purpose (that is, pre-existing documents, broadly). The OFT believes that there should be

⁶ Under section 241(2) of the Enterprise Act 2002, where 'specified information' is disclosed for the purpose of facilitating the OFT's statutory functions and is not made available to the public, the person(s) to whom the information is disclosed may not disclose it further without the agreement of the OFT. Under section 245 of the Act, disclosure of specified information may be a criminal offence.

no blanket exclusion of access to pre-existing documents, as this would confer advantages in litigation that would not have been obtained but for the leniency application. However, the OFT believes that a request for access in the form of a request for all documents submitted to the competition authority should be rejected.

Options 29 and 30

- 3.12 The Green Paper assumes that cartelists are jointly and severally liable under the law of the Member States for losses arising from a breach of Article 81. Joint and several liability can arise under English law, for example, where there is a breach of duty imposed jointly on two or more persons, where persons take 'concerted action to a common end' and in the course of executing that joint purpose any one of them commits a tort, or where persons' tortious acts combine to produce the same damage. Joint and several liability does not arise where two or more persons not acting in concert cause different damage to the same claimant. The practical effect of this for present purposes is that, where A, B and C enter into a cartel and a purchaser buys 50 per cent of his requirements from A and 50 per cent from B, the purchaser can sue not only A and B but also C for the whole of the overcharge on the products purchased from A and B (and any other damage caused to the purchaser by the cartel), despite the fact that the purchaser has bought nothing from C.
- 3.13 Adoption of Option 29 (rebate on damages claims) or Option 30 (removal of joint and several liability from the leniency applicant) would create an additional incentive for an undertaking to apply for leniency. To take Options 29 and 30 to the extreme, it could even be argued that a leniency applicant's liability for civil damages should be excluded altogether.
- 3.14 The options have a number of drawbacks. First, Options 29 and 30 could mean that a claimant is not fully compensated for his loss and therefore reduce incentives to bring an action. Even if claims against other infringers (who are assumed to be jointly and severally liable for

the entire damage) remain unchanged, the identity of the defendant may be a key consideration in a claimant's decision whether to go ahead with a private action at all. If the other infringers are not as financially strong as the leniency applicant, the claimant may decide not to take legal action – there is little point in suing someone who cannot pay.

3.15 Second, claimants are likely to be discouraged from suing if, in addition to proving causation and loss, they have to define the relevant market and work out market shares. If market definition is to play a role, it must be for the cartelist, rather than the claimant, to convince the court at his own cost of the correct market definition. The other cartelists would also need to be involved, as the extent of their liability would depend on the market definition adopted.

3.16 The main problem with Options 29 and 30, as drafted, however, is that they would confer advantages in litigation that would not have been obtained but for the leniency application. The OFT would therefore put forward one further option, which the OFT believes would strike a balance between the need for full recovery by the claimant and the public interest in not discouraging undertakings from applying for leniency. The OFT suggests allowing claimants to sue and obtain judgment against the leniency applicant under normal principles of joint and several liability, whilst empowering the court to allow the leniency applicant, in turn, to seek contributions of up to 100 per cent from the other cartelists.

3.17 In England and Wales, a mechanism already exists under the Civil Liability (Contribution) Act 1978:

Section 1(1) provides that, '... any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)'.

Section 2(1) provides that, '... the amount of the contribution recoverable ... shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question'.

Section 2(2) provides that, '... the court shall have power ... to exempt any person from liability to make a contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity'.⁷

The position in Scots law, as governed by section 3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940, is similar but not identical.

- 3.18 One further issue which deserves consideration is whether and to what extent the protections envisaged for leniency applicants should be available to (i) applicants qualifying for immunity (that is, 100 per cent leniency); and (ii) applicants qualifying for some lesser form of leniency.
- 3.19 The OFT's practice distinguishes between three types of leniency. A 'Type A' case refers to the situation where an applicant is the first to come forward and there is no pre-existing administrative or criminal investigation. In such circumstances, the OFT grants full immunity from financial penalties – it has no discretion in the matter. A 'Type B' case refers to the situation where an applicant is the first to come forward and there is a pre-existing administrative and/or criminal investigation. Although full immunity remains available in a Type B case, grant of such immunity is discretionary. 'Type C' describes the situation where an applicant is not the first to come forward and there is a pre-existing administrative and/or criminal investigation. In a Type C case, the OFT has discretion to grant a reduction of up to 50 per cent in the level of

⁷ The provisions of the Act also consider agreements to make a payment in settlement or compromise of a claim.

any fines, but no more. Leniency is available not only in respect of horizontal cartels, but also in respect of vertical price-fixing.⁸

- 3.20 If the protections were only available in Type A cases, the incentive for undertakings to come forward **before an investigation has been opened** would be increased. This would assist the competition authority in uncovering cartels. However, even in Type B cases, the evidence available to the competition authority may be limited or fragmentary, even after inspections have been carried out. Attracting a leniency applicant may, therefore, be critical to the authority's ability to interpret the evidence and 'fill in the gaps'. Finally, the value of the second or third leniency applicant to come forward should not be underestimated and it may be that some incentive should be allowed for them too.

⁸ *OFT's guidance as to the appropriate amount of a penalty*, December 2004 (OFT423).

4 EXEMPLARY DAMAGES

- 4.1 A related issue (which is dealt with mainly in Questions E and F of the Green Paper) is the type of damages that may be available as against a cartel. In England and Wales, exemplary damages (otherwise known as 'punitive damages') are available at common law in three situations, as outlined in *Rookes v Barnard*.⁹ (The courts in Scotland have not recognised exemplary damages to date.) Exemplary damages are available where, for instance, 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the [claimant]'. Undertakings might well enter into a cartel having made such a calculation. Exemplary damages have never been awarded in a competition case in England and Wales to date, but the issue has now arisen in *Healthcare at Home v Genzyme Limited*¹⁰ (a case on abuse of a dominant position) in the Competition Appeal Tribunal. The comments in this section may therefore need to be reviewed once any judgment of the Tribunal has been handed down.
- 4.2 The Green Paper/Working Paper suggests the concept of 'double damages', that is, a multiplication by two of the compensatory damages available to a claimant. Although the OFT does not believe that compulsory multiple damages would be appropriate – exemplary damages are, of course, awarded at the discretion of the court – it may be appropriate for the 'double damages' concept to form the focus or starting point for the court when it is considering an award of exemplary damages for breaches of competition law. It may be that, in an

⁹ *Rookes v Barnard* [1964] AC 1129, HL.

¹⁰ Case number 1060/5/7/06, registered on 5 April 2006.

appropriate case, the OFT would use its power to submit observations to suggest that the court award such damages against a defendant.¹¹

- 4.3 However, the OFT considers that it would not be appropriate for a court to award exemplary damages against a leniency applicant. In the US, for example, the Antitrust Criminal Penalty Enhancement and Reform Act (Title II of H.R. 1086) has removed from 'antitrust leniency applicants' satisfying the relevant conditions any exposure to the punitive (but not the compensatory) element of damages awards under US law.

¹¹ The OFT may, acting on its own initiative, submit written observations to a national court on issues relating to the application of Article 81 or 82 of the EC Treaty. With the permission of the court in question, it may also submit oral observations. The OFT has stated its intention to use its power to submit written and oral observations in a way which will best assist the courts and the development of competition law. See *Enforcement*, December 2004 (OFT407).

5 COLLECTIVE ACTIONS AND PROTECTING CONSUMER INTERESTS

5.1 The following comments concern Question H of the Green Paper/Working Paper.

5.2 Two policy options are put forward in the Green Paper/Working Paper:

'Option 25 - A cause of action for consumer associations without depriving individual consumers of bringing an action. Consideration should be given to issues such as standing (a possible registration or authorisation system), the distribution of damages (whether damages go to the association itself or to its members), and the quantification of damages (damages awarded to the association could be calculated on the basis of the illegal gain of the defendant, whereas damages awarded to the members are calculated on the basis of the individual damage suffered).

Option 26 - A special provision for collective action by groups of purchasers other than final consumers.'

5.3 There is increasing global consensus that the focus of competition law should be on protecting consumer welfare. This focus is reflected in the mission statement of the OFT, which is to 'make markets work well for consumers'.

5.4 Accordingly, the OFT is in favour of a cause of action for consumer associations which does not deprive individual consumers of the ability to bring an action, as suggested in Option 25. Option 25 has in fact been part of the law of the United Kingdom since 20 June 2003. 'Specified bodies' may bring a 'consumer claim' in the Competition Appeal Tribunal under section 47B of the Competition Act 1998.¹² Which? (formerly known as the Consumers' Association) became a

¹² HM Government's response includes a detailed description of the terms of section 47B.

specified body on 1 October 2005; the OFT may itself wish to apply to the Secretary of State to become a specified body in due course.¹³

5.5 Option 26 is also legal reality in England and Wales (although there is no **competition-law-specific** provision for collective action by groups of consumers other than final consumers) – representative actions and 'group litigation' are possible under the terms of Part 19 of the Civil Procedure Rules.¹⁴ There is no direct equivalent in Scotland, but it is possible to arrange administratively for cases to be dealt with together, if the parties agree. The OFT is not aware of any representative actions or group litigation being brought in the United Kingdom for breach of the EC competition rules.

¹³ The OFT believes that it fulfils the criteria set out in *Claims on behalf of Consumers - Guidance for Prospective Specified Bodies*, published by the Department of Trade and Industry.

¹⁴ HM Government's response includes more detail on Part 19.

6 THE PASSING-ON DEFENCE AND INDIRECT PURCHASERS' STANDING

6.1 The following comments concern Question G (on the passing-on defence and indirect purchasers' standing).

6.2 Four policy options are put forward in the Green Paper:

'Option 21 - The passing-on defence is allowed and both direct and indirect purchasers can sue the infringer. This option would entail the risk that the direct purchaser will be unsuccessful in claiming damages as the infringer will be able to use the passing-on defence and that indirect purchasers will not be successful either because they will be unable to show if and to what extent the damages are passed on along the supply chain. Special consideration should be given in this respect to the burden of proof.

Option 22 - The passing-on defence is excluded and only direct purchasers can sue the infringer. Under this option direct purchasers will be in a better position as the difficulties associated with the passing-on defence will not burden the proceedings.

Option 23 - The passing-on defence is excluded and both direct and indirect purchasers can sue the infringer. While the exclusion of the passing-on defence renders these actions less burdensome for the claimants, this option entails the possibility of the defendant being ordered to pay multiple damages as both the indirect and direct purchasers can claim.

Option 24 - A two-step procedure, in which the passing-on defence is excluded, the infringer can be sued by any victim and, in a second step, the overcharge is distributed between all the parties who have suffered a loss. This option is technically difficult but has the advantage of providing fair compensation for all victims.'

- 6.3 The passing-on defence and indirect purchaser standing is one of the most controversial issues in relation to private enforcement. The OFT believes that this issue, in particular, is likely to require further debate and the views expressed in this paper should not, therefore, be treated as final. Arguably, the issue could have been treated more fully in the Working Paper.
- 6.4 As mentioned above, there is increasing consensus that the focus of competition law should be on protecting consumer welfare. The OFT believes that it is likely to be inappropriate in policy terms to deny consumers and other end-users the right to sue for damages arising from breach of the competition rules.¹⁵ In many instances, it is consumers and end-users who bear the brunt of infringements as increased costs are passed along the chain of distribution. It follows that the OFT would be opposed to the adoption of Option 22.¹⁶
- 6.5 The OFT also believes that claims by consumers, consumer associations and other end-users, in particular, should be made easier. Other purchasers should have the right to recover the loss they have suffered. Options 21 and 24 are intended to achieve the latter result. Although apportioning loss among victims is technically difficult, it is by no means impossible. Apportioning loss may, however, significantly increase the

¹⁵ There has been a considerable backlash in the United States against the ruling of a majority of the US Supreme Court in *Illinois Brick Co. v Illinois*, 431 U.S. 720 (1977), pursuant to which claims by indirect purchasers were precluded. A majority of US states have now enacted 'Illinois Brick Repealer' statutes to preserve indirect purchasers' rights to sue in state courts. In many of those states, the Supreme Court's earlier majority ruling in *Hanover Shoe v United Shoe Mach.*, 392 U.S. 481 (1968), pursuant to which the passing-on defence was excluded, has also been overturned.

¹⁶ Adoption of Option 22 would wholly incorporate the judgments of the majority of the US Supreme Court in *Hanover Shoe* and *Illinois Brick*.

overall cost of private actions - whether that cost should be borne by the claimant or the defendant is a separate issue.

- 6.6 The key policy choice suggested by the Green Paper/Working Paper appears to be whether to (i) aim for fair compensation for all at the expense of practicality or deterrence, or (ii) risk an unfair distribution of damages in the interests of simplicity and deterrence. The OFT has explored whether it is possible to strike a balance between these two policy choices and has suggested one possible model (which is a variant of Option 21) for further consideration below.

Model for further consideration

Supplyco is a supplier which has entered into a cartel; the cartel has resulted in increased prices. (It may be appropriate for there to be a rebuttable presumption that the cartel has resulted in a price increase of, for instance, 10 per cent.) Wholesaleco is a wholesaler which has purchased goods from Supplyco while the cartel was in operation. Kash and Karry is a customer of Wholesaleco, whereas C is a consumer or other end-user to whom Kash and Karry has resold the goods.

Where the infringing agreement comprises horizontal price-fixing, limiting production or supply, customer allocation/market-sharing or bid-rigging,¹⁷ there could be a presumption that C has lost the full amount of the (presumed) overcharge, rebuttable only where Supplyco is able to show that no overcharge was actually passed on to C.¹⁸ There would be no passing-on defence as such to C's claim.

Wholesaleco would be entitled to recover damages from Supplyco to the extent that it has suffered loss. Accordingly, it would be open to

¹⁷ These types of agreement coincide with those in section 188 of the Enterprise Act 2002, establishing the cartel offence.

¹⁸ A consumer association entitled to bring actions as contemplated by Option 25 would also benefit from the presumption.

Supplyco to argue that Wholesaleco has passed on the overcharge in whole or in part to Kash and Karry. Even if Wholesaleco had passed on the entire overcharge, it may still be able to show that it has suffered loss as a result of a decline in sales.

If Supplyco were sued by Kash and Karry, it would be open to Supplyco to argue that Kash and Karry has passed on the overcharge in whole or in part to C. Even if Kash and Karry had passed on the entire overcharge, it may still be able to show that it has suffered loss as a result of a decline in sales.

- 6.7 The proposed model therefore relieves the consumer or other end-user's burden of proving (i) that overcharge has been passed on to him at all; and (ii) (possibly) the amount of the overcharge that has been passed on to him. The model raises a risk of multiple liability – Supplyco is unlikely to be able to rebut the presumption that C has lost the full amount of the (presumed) overcharge and may also be required to pay damages to Wholesaleco and/or Kash and Karry, depending on whether they have (i) passed on the entire overcharge and (ii) suffered a decline in sales. Although any suggestion that a defendant should be required to pay 'compensation' greater than the amount of the (presumed) gain to him may be met with opposition in certain quarters, the OFT is of the view that some multiple liability (or at least the **risk** of multiple liability) is not objectionable in policy terms – the risk of having to pay damages more than once would increase the deterrent effect of the EC competition rules and reduce the incidence of infringements.

7 ACCESS TO EVIDENCE

- 7.1 The following comments concern Question B of the Green Paper/Working Paper.
- 7.2 Although Question B asks, 'Are special rules regarding access to documents held by a competition authority helpful for antitrust damages claims?' and 'How could such access be organised?', this issue is not the focus of Options 6 and 7.
- 7.3 Question B raises a number of difficult issues, including where the balance should be struck (i) between promotion of private enforcement and avoiding wholly speculative claims; (ii) between promotion of private enforcement and protection of leniency applicants;¹⁹ and (iii) between the burdens borne by the claimant and the competition authority respectively.²⁰ In the United Kingdom it will be necessary to consider these issues further in the context of possible amendments to Part 9 of the Enterprise Act 2002, which contains restrictions on disclosure applicable to the OFT. For the time being, and consistently with the text of a guideline which it has recently published,²¹ the OFT does not intend generally to disclose information on its files to claimants before it has taken a decision. The OFT would, of course, comply with any order of a court requiring disclosure.

¹⁹ See the discussion of Option 28 above.

²⁰ The costs to a competition authority of redacting confidential information and consulting appropriately are likely to be considerable. There will also be a cost to the undertakings under investigation, which will need to make representations to the competition authority as to confidentiality.

²¹ *Involving third parties in Competition Act investigations - Incorporating guidance on the submission of complaints*, April 2006 (OFT451).