

Encouraging Private Actions in Competition Law

Iain Mansfield
Department for Business, Innovation and Skills

The Case for Reform

Public enforcement and private actions

- In 2010/11, UK's world-class public competition regime generated £689m of benefit for the UK.
- In March, Government announced reforms to the public competition framework that will deliver even better outcomes for business, consumers and the economy.
- In parallel, Government wishes to encourage more private sector challenges to anti-competitive behaviour.
- Private actions can complement public enforcement by:
 - Enabling business to take direct action against anti-competitive behaviour.
 - Allowing consumers and businesses to recover money that they have lost as a result of anti-competitive behaviour.

Promoting growth and fairness

Growth

- Pro-Bono Competition Service gets around 100 calls a year, mainly from SMEs, e.g.
 - A small software developer who came under pressure from a major software company to discontinue the compatibility of his software with their programme.
 - A farmer who was trapped in a 30 year agreement with an advertising company for billboards, despite the Vertical Block Exemption stipulating that an agreement of this nature cannot be longer than 5 years.
- Empowering small businesses to tackle anti-competitive behaviour that is stifling their business can help drive growth and innovation.

Fairness

- Even if cartellists are caught and fined, very hard for consumers to get redress.
- In the BA/Virgin fuel cartel lawsuit, the case had to be heard before the US courts, not the UK courts.
- It is right that public enforcement should focus on detection, fining and deterrence – but consumers should also be able to get redress.

Notable Cases

- Which? vs JJB Sports [2008]
 - Collective action on behalf of consumers.
 - Only 130 claimants signed up (though some also settled later).
- Enron vs EWS (I) [2009]
 - Court of Appeal ruled that the scope for the CAT to go beyond the findings of the initial infringement is extremely limited.
 - All aspects of evidence and argumentation must relate to issues found in the initial infringement decision.
 - Considered and applied by the CAT in Emerson IV [2011] CAT 4.
- Emerald Supplies Ltd v. British Airways plc [2010]
 - Representative Rule under 19.6 of the CPR.
 - Rejected by Court of Appeal.
- Enron vs EWS (II) [2011]
 - Decisions of regulators are binding; not all findings of fact will be.

The Proposals

A greater role for the CAT

- Only 22% of the 41 judgments between 2005 and 2008 were in the CAT.
- Allow CAT to hear stand-alone cases as well as follow-on.
- Activate 16(1) of the Enterprise Act(2002) to allow the High Court to transfer cases to the CAT.
- Allow the CAT to hear injunctions
- Introduce a fast-track for SMEs to access justice in the CAT
 - Learning lessons from the Patents County Court
 - Swift access to injunctions
 - Allow cross-undertakings for damages to be waived or limited
 - Aim to hear the case within six months
 - Keep oral hearings to a matter of days
 - Costs capped at a maximum of £25,000 or lower in individual cases

A rebuttable presumption of loss

- No changes proposed to the question of whether a breach has been committed – simply to how damages are calculated once the breach is established.
- For cartel cases only.
- Economic literature indicates cartels typically raise prices between 18% and 54%, depending on the study.
- Presumption, rebuttable by either side, that the cartel has raised prices by 20%.
- Shifts the burden of proof to the side most likely to have the necessary information.

An opt-out collective action regime

- Opt-out the most effective way at delivering redress – and only way some cases would ever be brought.
- Open to consumers and/or businesses.
- Follow-on and stand-alone cases.
- No list of registered bodies – replace by rigorous judicial certification.
- Need to guard against frivolous or vexatious claims:
 - No treble damages
 - No contingency fees
 - Maintain the ‘loser-pays’ rule
 - Heard before a specialist tribunal only – the CAT.
 - Rigorous certification criteria.
 - Unclaimed funds given to Access to Justice Foundation

Alternative Dispute Resolution (ADR)

- ADR can reduce costs for both sides, lead to swifter resolution of problems and preserve good working relationships.
- ADR not mandatory – but strongly encouraged.
- New power for the CMA to order a redress scheme, or certify a voluntary settlement scheme, where a breach of competition law has already been found.
- Philip Collins, Chair of the OFT has said:
“It has been suggested that some form of ADR or Ombudsman system could be introduced to deliver [redress for consumers]. That may be attractive, but I do not believe that it will be effective unless it stands alongside a system for collective redress that enables cases to be taken through the courts efficiently and effectively, and at reasonable cost.”

Complementing public enforcement

- Need to ensure private enforcement complements public enforcement.
- Leniency essential to the public detection and enforcement of cartels.
- Protecting leniency documents from disclosure.
 - How far should the protection extend?
- Removing joint and several liability from immunity recipients.
- EU legislation also expected on this – speed and content of EU proposals will affect whether separate UK legislation is necessary.

Conclusion

- Private actions can complement the public enforcement regime.
- Driving growth by empowering small business to tackle anticompetitive behaviour.
- Increasing fairness, by allowing consumers and businesses to reclaim money they have lost due to anticompetitive behaviour.
- What is needed from Government is not to add to public functions, but to create the legal framework that will empower individuals and businesses to represent their own interests.
- Consultation published on April 24th; closes on July 24th.
<http://www.bis.gov.uk/assets/biscore/consumer-issues/docs/p/12-742-private-actions-in-competition-law-consultation.pdf>
- Looking forward to receiving responses from interested parties: email to competition.private.actions@bis.gsi.gov.uk