Oxera

Agenda

Advancing economics in business

Growth and fairness: private sector-led challenges to anti-competitive behaviour

The UK government is consulting on proposals to reform the regime for private actions under competition law, including a right of opt-out collective action, an increased role for the Competition Appeal Tribunal, and a focus on alternative dispute resolution. Based on international comparators, Iain Mansfield, UK Department for Business, Innovation and Skills, considers the potential economic impact of the proposals, contrasts them with a regime in which redress is facilitated primarily by the public competition authorities, and discusses the role of non-monetary remedies such as injunctive relief

Research by the UK Office of Fair Trading (OFT) shows that businesses view the present approach to private actions as one of the least effective aspects of the UK competition regime. A greater role for private actions would complement public enforcement, enhance the benefits of the competition regime to the UK economy, and allow businesses and consumers to claim redress for losses suffered. The government considers that what is needed is the creation of a legal framework that will empower individual consumers and businesses to represent their own interests.

A right to bring private actions for damages resulting from infringements of competition law has existed in the UK since its entry into the EU in 1973. Although it has been confirmed in numerous cases, including *Courage Ltd v. Crehan* and the House of Lords' decision in *Garden Cottage Foods Ltd v. Milk Marketing Board*, challenging infringements of competition law remains costly and complex. Between 2005 and 2008, only 27 cases resulted in judgments[1] and, while anecdotal evidence points to an increase in recent years, activity remains almost exclusively limited to large companies.

It is for these reasons that the UK government has brought forward a range of proposals to reform the private actions regime,[2] including a new right of opt-out collective action,[3] a significant increase in the jurisdiction and powers of the Competition Appeal Tribunal (CAT), and a new focus on alternative dispute resolution (ADR), which are intended to open up the competition regime to both consumers and businesses. Their aim is also to complement the reforms to the public regime being taken forward in the Enterprise and Regulatory Reform Bill, which will establish a new Competition and Markets Authority and ensure that a strengthened public competition regime remains at the heart of future enforcement.

Collective actions

Breaches of competition law can involve very large numbers of people each suffering a small individual loss, meaning that it is not cost-effective for any individual to bring a case to court. Allowing actions to be brought collectively overcomes this problem, enabling consumers and businesses to get redress, as well as acting as a further deterrent to anyone thinking of infringing competition law. The government has therefore proposed a new right to bring an opt-out collective action for breaches of competition law, to be heard before the CAT.

In assessing the likely impact of collective actions, the UK government has drawn heavily on international comparators, notably those of Canada, Australia and Portugal, where collective actions in competition law are permitted but subject to strict criteria. These systems have been compared in a study that considered a period of 16 years for Canada and Australia and 13 years for Portugal, during which time a total of 41 cases were brought.[4]

A striking feature of the study is the strong inverse correlation between the number of cases and the average size of settlement, as shown in Table 1 overleaf.

It is clear that an increased level of collective actions predominantly reflects an increase in the number of lower-value claims being pursued alongside

Table 1 Settlement level and number of cases in international collective actions systems, 1992–2008

	Canada	Australia	Portugal
Average number of successful cases per year	1.7	0.24	0.06
Mean settlement	$10.6m	$30.5m	$160m
Mean settlement per year	$18.2m	$7.4m	$5.6m
Mean settlement per year[1]	£11.8m	£4.8m	£3.6m

Note: [1] Exchange rate of £0.65=$1 as at January 2012 (approximate).
Source: Department for Business, Innovation and Skills (2012), 'Private Actions in Competition Law – A Consultation on Options for Reform'. Figures derived from Mulheron (2008), op. cit.

higher-value claims, rather than an increase in the number of claims across all values. This is not unexpected—if either the strictures of the regime or the culture of litigation result in a reduced number of cases, one would expect that only the most worthwhile cases would be pursued—but it does allow the likely impact to be assessed more easily.

In fact, if one scales the figures above by either GDP or population, the discrepancy between the different countries narrows still further. The government's best estimate is that the likely scale of redress is approximately £17m a year, though it must be emphasised that this estimate necessarily carries with it a considerable degree of uncertainty.

Despite the fact that redress is the primary purpose of collective actions, it is inevitable that they will also contribute to increasing deterrence. This is true of both follow-on and stand-alone actions: Commonwealth precedents suggest that damages typically increase the cost of infringement by between 30% and 150%, with an average of 80%,[5] and the possibility of such increased costs is likely to have an effect on potential cartelists when calculating the risk versus the reward of infringing competition law.

In assessing how much anti-competitive behaviour is deterred or modified for every infringement decision made, the OFT has previously calculated a deterrence ratio of 4:1 for abuse cases, 5:1 for cartel cases and 7:1 for commercial cases.[6] Studies have also shown that deterrence is further enhanced by the reputational issues caused by high levels of publicity. Both of these factors are likely to be strong features of private collective actions cases, meaning that successful stand-alone cases are likely to have a similar deterrent effect to an OFT finding of infringement. Given that, in Canada, 25% of collective actions cases are stand-alone, by increasing the number of infringements that are challenged, collective actions stand to make an important contribution to the competition regime and to creating a competitive economy (see Table 2 below).

The analysis also shows that the transactional costs of legal dispute are significant. It is for this reason that the UK consultation document proposes clear safeguards to prevent frivolous cases—most notably the maintenance of the 'loser pays' rule, whereby an unsuccessful litigant is liable for its opponent's costs. It is also why the consultation sets out the government's strong support for ADR, with the courts being the option of last resort, and invites private sector organisations to bring forward proposals on how they might facilitate responsible businesses to make such redress.

Swift and effective forms of redress—whether by expert determination, the facilitation of the competition authorities, or some form of collective settlement

Table 2 Total costs and benefits of private collective actions

Benefit	Court costs (£m)	Business costs (£m)	Deterrence (£m)	Net benefit per annum (£m)	Additional benefit: redress (£m)
Low scenario	–0.007	–4.1	–	–4.1	8.8
Best estimate	**–0.04**	**–13.9**	**40.9**	**27.0**	**16.9**
High scenario	–0.058	–16.2	188.8	172.5	35.7

Note: The analysis above is based on scaling the international figures by GDP to establish the annual redress, taking into account the variation between the three countries. Deterrence figures draw on the OFT deterrence ratios discussed above. The low scenario assumes no additional deterrence; the high scenario assumes a 5:1 deterrence ratio; and the best case assumes a 1:1 deterrence ratio for follow-on cases and a 5:1 deterrence ratio for stand-alone cases.
Source: Department for Business, Innovation and Skills (2012), op. cit.

procedure—have the potential to significantly reduce the costs involved in collective actions while maintaining the benefits. However, in the words of Philip Collins, Chair of the OFT:[7]

> It has been suggested that some form of ADR or Ombudsman system could be introduced to deliver [redress]. 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.

An alternative way of minimising the transactional costs would be to give the role of securing redress to a public sector body, such as an ombudsman or the competition authorities, thereby not only minimising the need for costly legal action by the parties, but also acting as a guard against frivolous cases. Such an arrangement would allow the relevant authority to consider a market-based approach to competition enforcement, taking into account restitution, removal of illicit gains, and deterrence. An example of such a system is that used in Denmark, where the Danish Consumer Ombudsman is the only body that can bring an opt-out case for infringements of consumer or competition law.

In such a system, to quote Professor Christopher Hodges of the University of Oxford:[8]

> A mechanism of private action by private parties might still be provided in this system as – but only as – a fall-back and ultimate solution where no public enforcement action is taken.

Although the government's consultation discusses whether the competition authorities could have a small role in facilitating redress, we would be concerned that making them the primary redress body would both result in fewer cases being taken than under a private collective actions model, and also lead to a potential diversion of resources from detection and deterrence. Such an approach would also not be in keeping with the spirit of the government's proposals to empower businesses to take action against anti-competitive behaviour that may be harming them.

It is possible to envisage a model in which private actions are allowed only in cases where the competition authorities have chosen not to investigate; however, in practice this would be difficult to determine. It is unlikely that the competition authorities would wish to rule out definitively the possibility of future action, especially if new evidence emerged. The likelihood is that a public-only redress regime would therefore be confined to follow-on cases.

Using a similar methodology to that discussed above, it can be seen that stripping out stand-alone cases would have a significant impact on the overall economic benefits, as shown in Table 3 below.

The consultation proposals have therefore indicated that while ADR, which may involve a role for the competition authorities, is important, it should not replace the ability of an injured party to take action directly.

Reforms to the Competition Appeal Tribunal

While collective actions may be predominantly about redress for consumers, empowering and enabling businesses to take action to challenge anti-competitive behaviour that is stifling their activities offer the potential to stimulate growth and innovation.

The competition authorities will, of course, remain at the heart of the system. However, public resources are inevitably limited and will not be able to consider every case. In some circumstances, parties taking out private actions may be better placed to know where anti-competitive behaviour is causing them harm and are best placed to weigh up the relative costs and rewards to them of pursuing an action.[9]

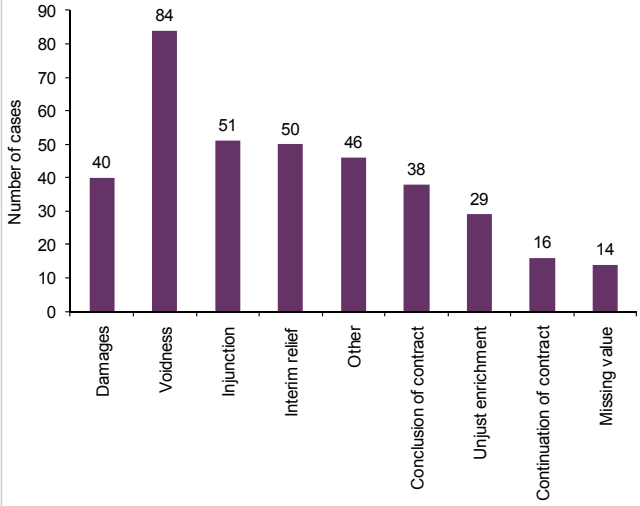
In such cases, what a business needs most may not be redress but simply for the anti-competitive behaviour to stop, so that the business can return to its core activities of growth and profit-making. A study of German competition cases between 2005 and 2007 shows that damages were sought in only approximately 10% of cases, with the majority of the rest being resolved by voiding of contracts, injunctions or other

Table 3 Costs and benefits of a public redress regime, in the absence of private actions

Benefit	No. of cases per annum	OFT costs per case (£'000)	Business costs per case (£'000)	Gross costs per case (£'000)	Deterrence per case (£'000)	Net benefit per annum (£'000)	Additional redress per annum (£'000)
Low scenario	0.5	8	450	458	–	–229	1,050
Best estimate	**0.5**	**8**	**350**	**358**	**2,100**	**808**	**1,050**
High scenario	0.5	8	250	258	10,250	4,996	1,050

Source: Department for Business, Innovation and Skills (2012), op. cit.

Figure 1 Private competition cases in Germany between 2005 and 2007 by remedy type



Source: Peyer, S. (2012), 'Private Antitrust Litigation in Germany from 2005 to 2007: Empirical Evidence', **8**:2, *Journal of Competition Law & Economics*, pp. 331–59. A similar figure is on p. 345 in that paper. Remedy classification as determined by S. Peyer.

forms of relief for the affected parties (see Figure 1 above). Although one must be cautious when drawing parallels between the UK and Germany, due to the substantive difference of law regarding the concept of 'economic dependency', the fact that injunctive relief is important is a safe enough conclusion.

It is for these reasons that the government has proposed a significant expansion in the jurisdiction and powers of the CAT, allowing it to hear stand-alone as well as follow-on cases, and giving it the power to grant injunctions. The CAT's specialist competition expertise means that it should be well suited to handling complex competition litigation: businesses will benefit from the ability to take their cases directly to a specialist and dedicated tribunal. Furthermore, by concentrating on essential issues and enforcing timetables, the CAT can ensure that costs for all parties are kept to a minimum.

These reforms by themselves, however, may not be sufficient to enable smaller businesses to confidently challenge anti-competitive behaviour. The Competition Pro Bono Scheme, established to provide an independent source of expert competition advice, receives close to 100 queries a year from businesses and individuals concerned about potential breaches of competition law, predominantly from smaller businesses. However, the *Purple Parking* case last year,[10] in which two valet parking businesses successfully challenged an abuse of dominance by Heathrow Airport, is one of the few cases in which a smaller company has succeeded in pursuing such a claim through the courts.

That is why the government's consultation proposes the establishment of a fast-track procedure in the CAT, available to small and medium-sized enterprises (SMEs), and focused on non-monetary remedies such as injunctions. Access to the fast track would be determined by the judicial oversight of a CAT Chairman—clearly, not all cases would be suitable—and, once allocated to the fast track, the claimant would benefit from a procedure that would first seek to provide swift interim relief, and then involve cost-capping, no or limited court fees, a focus on non-monetary remedies and a cap on the damages that could be claimed, as well as a clear undertaking to complete the case as swiftly as possible. Although the government expects the procedure to be of most use to SMEs, it has been suggested that the fast track could be opened up to appropriate claims from enterprises of any size, which is a possibility that the government will need to consider carefully.

Conclusion

Anti-competitive activity has a negative effect on the economy as a whole, typically leading to lower output and higher prices of goods and services. These costs are not confined to transfers between the infringer and the harmed party, but include costs to society as a whole arising from productive and allocative inefficiency, such as reduced choice for consumers, sub-optimal allocation of resources, and reduced innovation.

The economic analysis presented here, and in the government's impact assessment, is necessarily an estimate. Modelling the economic gains from easier access to injunctive relief and non-monetary remedies is extremely difficult. Even in the case of damages, where benefits can be more easily quantified, it is well known that for every case that goes to court, several others will settle. What is clear is that, taken alongside the reforms to the public regime, the government's proposals have the potential to significantly enhance the competition regime, driving benefits both for consumers and for business.

The government's consultation will close on July 24th 2012.[11] Following the conclusion of the consultation, the government will consider carefully any submissions received and will then publish a response, setting out which of the proposals it will be taking forward and in what form. The timetable for any legal changes would need to be considered carefully and, if the government chooses to adopt these proposals, the earliest that it would be possible for them to enter into force would be 2014.

Iain Mansfield

[1] Rodger, B. (2009), 'Competition Law Litigation in the UK Courts: A Study of all Cases 2005–2008—Part 1', *Global Competition Litigation Review*, **2**, pp. 93–114.
[2] Department for Business, Innovation and Skills (2012), 'Private Actions in Competition Law – A Consultation on Options for Reform'.
[3] In an opt-out collective action, a case may be brought on behalf of a defined category of claimants, such as all those who bought Product X between Date Y and Date Z. All parties who fall within the definition of the represented group are bound by the outcome of the case unless they actively opt out of the action. Damages are determined on the basis of an estimation of the total size of the group, with claimants coming forward after the quantification of damages to claim their share.
[4] Mulheron, R. (2008), 'Competition Law Cases under the Opt-out Regimes of Australia, Canada and Portugal', research paper for submission to the Department for Business, Enterprise and Regulatory Reform.
[5] Figures derived from data in Mulheron, R. (2008), op. cit.
[6] See Office of Fair Trading (2011), 'The Impact of Competition Interventions on Compliance and Deterrence', final report, December. Although these figures have been updated in the OFT's report, the report cautions that the figures cannot be directly compared. The calculations in this article make use of the previous ratios.
[7] Office of Fair Trading (2011), 'Competition Law: Sanctions, Redress and Compliance', speech by Philip Collins, King's College London, June 27th.
[8] Hodges, C.J.S. (2011), 'A Market-Based Competition Enforcement Policy', *European Business Law Review*, **22**:3, June, pp. 261–91.
[9] McAfee, R.P., Mialon, H.M. and Mialon, S.H. (2008), 'Private v. Public Antitrust Enforcement: A Strategic Analysis', *Journal of Public Economics*, **92**:10–11, October, pp. 1836–75.
[10] *Purple Parking Limited and Meteor Parking Limited v Heathrow Airport Limited [2011] EWHC 987 (Ch)*.
[11] We would welcome any contributions—responses should be sent to: competition.private.actions@bis.gsi.gov.uk.