Office of Fair Trading

# Penalties and private actions in the UK

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Views expressed are personal and do not necessarily reflect those of the OFT.

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# Objective of the presentation

- An overview of the OFT's approach to penalties under the Competition Act 1998
- Private actions
- Settlements

# Step 1 – Starting point

- **OFT applies a percentage rate to the 'relevant turnover' of the undertaking - up to a maximum of 10 percent of relevant turnover**
- **'Relevant turnover' is turnover of the undertaking in the *relevant product market and relevant geographic market* affected by the infringement in the last financial year**

# Step 1 – Starting point

- To determine the seriousness and therefore the starting point percentage, OFT considers the:
  - Nature of the product
  - Structure of the market
  - Market shares of the undertakings
  - Entry conditions
  - Effect on competitors and third parties
  - Damage caused to consumers
- OFT policy to choose a higher percentage starting point for more serious cases, for example, price-fixing

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# Step 2 - Duration

- The starting point reached after Step 1 may be increased (or in exceptional circumstances decreased) to take into account the duration of the infringement
- Penalties for infringements which last for more than one year may be multiplied by not more than the number of years of the infringement
- The Guidance allows for part years to be treated as full years - example: 2 years and 9 months = multiplier of 3
- In practice usually round up to half years – example: 2 years and = multiplier of 2.5

# Step 3 – Adjustment for other factors (deterrence)

- The penalty figure reached after Steps 1 and 2 may be adjusted for deterrence at Step 3
- Usually results in either an increase or no adjustment for deterrence – factors considered include:
  - Objective estimate of any economic or financial benefit
  - Special characteristics including the size and financial position of the undertaking in question

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# Recent innovation – Minimum Deterrence Threshold (MDT)

- **Application of OFT's penalties guidance with MDT developed - *Roofing cases*, upheld on appeal in *Makers v OFT***
- **Purpose of MDT is to address the issue of companies having a relatively high total but relatively low relevant turnover**
- **How does it work?**
  - **If at the end of Step 2 the figure reached is not at least equal to *n* percent of the undertakings total turnover the figure is increased to this amount to achieve sufficient deterrence**
- **MDT is the same for all undertakings in the case but it is possible to increase the figure at Step 3 further if other deterrence factors need to be taken into account for a particular undertaking (for example, compensation payments in roofing)**

# Step 4 – Adjustment for aggravating factors

- Aggravating factors could include, among other things:
  - Senior management/director involvement (also could be linked to senior management ignoring existence of compliance programme)
  - Repeat offenders
  - Role of the undertaking as instigator in the infringement

# Step 4 - Mitigation

- Mitigating factors could include, among other things:
  - Where the undertaking is acting under severe pressure
  - Introduction of compliance programme
  - Co-operation which enables the enforcement process to be concluded more effectively and/or speedily

# Step 5 – Statutory cap

**OFT may not impose a penalty that exceeds 10 percent of the worldwide turnover of the undertaking in its last business year preceding the date of the OFT's Decision**

# OFT approach to penalties

- OFT Guidance as to the appropriate amount of a penalty (December 2004) - twin policy objectives:
  - To impose penalties on infringing undertakings which reflect the seriousness of the infringement
  - To ensure that the threat of penalties will deter undertakings from engaging in anti-competitive practices (both infringing companies and wider)

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# Policy questions for the future

- Perception that current deterrence is not optimal:
  - OFT policy team and caseworkers
  - Anecdotal evidence from lawyers
  - Instances of repeat offenders, for example, Roofing and Construction

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# Deterrence survey

- OFT commissioned Deloitte to conduct a survey on the deterrent effect of competition enforcement by the OFT
- Between May 06 and April 07:
  - Telephone surveys of 234 lawyers and 202 UK companies
  - 30 interviews with lawyers, economists and companies

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# Top factors in achieving optimum deterrence

**Lawyers**

1. Criminal penalties
2. Fines
3. Disqualification of directors
4. Adverse publicity
5. Private damage actions

**Companies**

1. Criminal penalties
2. Disqualification of directors
3. Adverse publicity
4. Fines
5. Private damage actions

Other suggestions include: increased publicity and training (1), faster decision taking (3), greater clarity in the law (8), improved leniency incentives (10) and focus on high impact cases (11)

# Deterrence survey – outcomes

- Survey **highlighted** the need for a more holistic approach to 'sanctions'
- **Level of penalties for infringements can be expected to generate a corresponding level of deterrence**
- **Lawyers and businesses consider criminal penalties to be the most important sanction**
- **An effective director disqualification regime is seen as a serious deterrent by lawyers and businesses**
- **An effective private actions regime is also seen as a serious deterrent by lawyers and businesses**

# Preliminary conclusions

- Likely to see higher actual penalties in cases
- OFT's criminal powers likely to be used
- Reviewing policy on Directors Disqualification Orders to optimise usage
- Changes to optimise contribution of private actions

# OFT consultation on private actions

- Discussion Paper (OFT916) published in April 2007
- Consultation formally closed in June 2007
- Responses published in September 2007
- Public hearing held on 24 September 2007
- Recommendations to Government issued in November 2007

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# Private actions in the UK

- Most of the main structural and legal elements for effective private actions in competition law are already in place in the UK
- DG COMP Discussion Paper reflects relative strengths of UK system
- UK follow-on system said to be working reasonably for larger players (settlements) but number of court cases remains low
- Consumers have never recovered
- Consumers and small and medium-sized businesses (in particular) face similar barriers
- Private actions not making the contribution envisaged by 1999 white paper

# Private actions - principles

- Changes must be aimed at providing access to redress, while safeguarding against the development of a litigation culture, by ensuring that there are procedures, criteria and filters in place to facilitate the fair, efficient and cost-effective resolution of disputes
- Consumers and businesses should be able to obtain redress irrespective of whether there has been prior action by a competition authority
- Bodies which are representatives of consumers and businesses should be allowed to bring actions on behalf of those persons
- Private competition law actions should exist alongside, and in harmony with, public enforcement

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# Recommendations

- Modifying existing procedures, or introducing new procedures, to facilitate representative actions on behalf of consumers and businesses
- Permitting greater percentage increase on lawyers' appropriate cases
- Codifying courts' discretion to cap parties' costs liabilities / provide cost-protection in appropriate cases
- Establishing a merits-based litigation fund of last resort

# Recommendations

- **Requiring UK courts and tribunals to 'have regard' to UK NCAs' decisions and guidance**
- **Conferring power for secondary legislation to exclude leniency documents from use in litigation without consent**
- **Conferring power for secondary legislation to remove joint and several liability for immunity recipients**

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# Private actions - checks and balances to prevent excess

- In the UK there is no (right to) jury trial in damages cases
- In the UK damages are compensatory - no treble damages
- In the US if the claimant loses, he is not liable for the other party's costs but if he wins, he is entitled to reasonable attorney's fees – in the UK the basic principle is that 'costs follow the event'
- Disclosure in UK is more limited than US discovery
- Courts in England and Wales already have strong case management powers to deal with ill-founded cases and make greater use of them than courts in other jurisdictions
- Ensure that procedures, criteria and filters are in place to facilitate the fair, efficient and cost-effective resolution of disputes

# Settlements

- Gone from sceptical to cautiously in favour

## In favour

- Faster, greater efficiency achieved, more cases – leads to greater impact and increased deterrence

## Cautious

- Must take right decisions - NCAs generally still need to establish credibility
- Impact on leniency – significant percentage necessary (quality of evidence)

# Settlements

- Not 'as of right', but open to discussion
- May use different methods in different cases
  - Precedent value of early cases limited
  - Courts support on JR

# Concluding remarks

- Exciting time for the UK regime
- UK regime already seen as one of the best in the world
- Changes will further enhance UK regime