UK NATIONAL REPORTER'S RESPONSE

TO QUESTIONS FOR LIDC PRAGUE CONGRESS 2012

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Contents

1. GENERAL BACKGROUND

This report has been prepared in accordance with the 'directives' of the General Rapporteur and the Deputy General Rapporteur circulated in January 2012. The report is intended to assist the International Rapporteur in preparing her report for the Prague Congress in October 2012. This report follows the same basic structure as the questionnaire designed by the International Rapporteur, and discusses the domestic competition law, policy and practice towards small- and medium-size enterprises ('SMEs') in the United Kingdom ('UK').

There is no standard definition of an SME in the UK. Frequently used definitions are based on the number of employees (less than 250 employees) and/or annual turnover (less than £25m annual turnover)[1]. There are approximately 4.8 million SME businesses in the UK, comprising 99.9 per cent of all businesses[2]. The UK Government has acknowledged that SMEs have a crucial importance for the UK economy and has introduced various policies to support the financing and growth of SMEs.[3] In parallel to this domestic agenda the European Commission is committed to promoting the growth of SMEs. In June 2008 the Commission adopted the 'Small Business Act' for Europe[4], which applies to all independent companies which have fewer than 250 employees, seeking to reduce the 'red tape', at EU and national level, on SMEs. In November 2011 the Commission published a report entitled *Minimizing regulatory burden for small and medium sized enterprises (SMEs) Adapting EU regulation to the needs of micro-*

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[1] See BIS Economics Paper No 16, *SME Access to External Finance*, January 2012, available at www.bis.gov.uk.

[2] Department for Business, Innovation & Skills/HM Treasury, *Financing a private sector recovery*, Cm 7923, July 2010, para 3.5.

[3] See e.g. the Department for Business, Innovation & Skills initiative, *Business Coaching for Growth programme*, available at www.businessgrowth.uk.com; HM Treasury *Accelerating the SME economic engine: through transparent, simple and strategic procurement,* available at www.hm-treasury.gov.uk.

[4] COM(2008) 394, final, 25 June 2008. See Commission Press Release IP/11/218, 23 February 2011.

enterprises[5] which sets out how the Commission intends to strengthen the use of exemptions or specific, 'lighter' legislative regimes for SMEs or micro-companies[6].

In accordance with the instructions to the national rapporteurs, a draft version of this report was circulated to members of the Competition Law Association ('CLA') in March 2012 to seek the views of members on its content. The final version of this report incorporates the views expressed by CLA members at a meeting held on 14 May 2012 in response to the normative questions contained in the International Rapporteur's questionnaire.

2. LEGAL DEFINITIONS

2.1 Overview of UK competition law

A major piece of competition legislation in the UK is the Competition Act 1998 which entered into force on 1 March 2000. The Competition Act contains two prohibitions. The so-called 'Chapter I prohibition' is modelled on Article 101 TFEU, and forbids agreements that restrict competition. The Chapter II prohibition is modelled on Article 102 and forbids the abuse of a dominant position. The Act gives to the Office of Fair Trading ('the OFT') wide powers to enforce the EU and UK competition rules,[7] in particular by adopting decisions finding infringements and imposing fines. In relation to certain sectors, such as electronic communications and energy, the competition powers of the OFT are shared concurrently with the relevant sectoral regulators: these are the Gas and Electricity Markets Authority ('OFGEM'), the Office of Communications ('OFCOM'), the Water Services Regulation Authority ('OFWAT'), the Office of Rail Regulation, the Northern Ireland Authority for Energy Regulation and the Civil Aviation Authority (together with the OFT, 'the competition authorities'). Appeals on the merits may be taken to the Competition Appeal Tribunal ('the CAT') against 'appealable decisions', as

[5] COM (2011) 803, 23 November 2011.

[6] See similarly the OECD Best Practices Roundtable, *General Cartel Bans: Criteria for Exemption for Small and Medium-sized Enterprises* (1996), available at www.oced.org.

[7] The Competition Act 1998 and Other Enactments (Amendment) Regulations 2004 SI 2004/1261 amended the Competition Act to align domestic law with the provisions of Regulation 1/2003 OJ 2003 L1/1.

set out in sections 46 and 47 of the Competition Act; appealable decisions includes decisions finding infringements of the Act and/or of Articles 101 and 102 TFEU and decisions that those prohibitions have not been infringed.

The other major pillars of domestic competition law are contained in the Enterprise Act 2002 which entered into force on 20 June 2003. Briefly, Part 3 of this Act provides that the OFT has a duty (subject to certain exceptions) to refer to the Competition Commission ('CC') mergers which it believes may result in a 'substantial lessening of competition', regardless of whether or not they have been notified. Where a merger is referred to the CC for a detailed investigation, the CC must publish a report setting out its conclusions on whether the merger gives rise to an anti-competitive outcome and, in the case of such an outcome, what remedies are needed. Part 4 of this Act makes provision for the OFT (and the sectoral regulators) to refer a market in the UK to the Competition Commission for investigation. Where the OFT discovers a competition problem, in particular problems that fall outside the Chapter I and II prohibitions (or Articles 101 and 102 TFEU), it is open to the OFT to refer the matter to the Competition Commission to conduct a market-wide investigation in order to examine how the conditions of competition might be improved. The remedies available under the Enterprise Act are extensive, and include the possibility of a structural remedy[8].

On 15 March 2012 the Government announced that it will propose legislation to create a single Competition and Markets Authority ('the CMA') and transfer the competition functions of the OFT and the Competition Commission to the CMA[9]. The creation of the CMA will necessitate some changes to the decision-making process in mergers and market investigations to reflect the fact that decisions will no longer be taken by separate bodies. The Government will

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[8] Enterprise Act 2002, Sch 8; on the law and practice in relation to structural remedies under the Enterprise Act, and its predecessor, the Fair Trading Act 1973 see the speech by Freeman 'The UK experience of divestment remedies in market investigations', 7 October 2010, available at www.competition-commission.org.uk.

[9] *Growth, competition and the competition regime: Government response to consultation*, 15 March 2012, chapter 3, available at www.bis.gov.uk.

publish a draft Bill outlining these changes in due course. The CMA is currently expected to be operational by April 2014.

2.2 SMEs under the Competition Act 1998

The Competition Act does not itself contain a definition of a SME for the purposes of applying the EU and/or UK competition rules in the UK. Sections 39 and 40 of the Act provide, however, small companies with immunity from the imposition of financial penalties for breach of the Chapter I and/or the Chapter II prohibitions[10].

Section 39(3) of the Act provides that a party to a 'small agreement' is immune from the imposition of a penalty in respect of an infringement of the Chapter I prohibition. The limited immunity is subject to three qualifications. The first is that price fixing agreements[11] are excluded from the immunity for small agreements by virtue of section 39(1)(b). Second, the OFT may, under section 39(4), withdraw the benefit of the limited immunity in an individual case. Third, the immunity is limited because it does not extend to transgressions of Article 101 TFEU. Provision is made in section 39(2) for the criteria by which a category of 'small agreements' is to be defined by reference to the size of the turnover of the undertaking(s) concerned and/or the share of the market affected by the agreement or conduct. Regulation 3 of the Competition Act 1998 (Small Agreements and Conduct of Minor Significance) Regulations 2000 ('the 2000 Regulations')[12] states that 'small agreements' for the purposes of section 39 are those between undertakings whose combined turnover in the business year preceding the infringement does not exceed £20 million.

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[10] There is no equivalent provision of domestic law purporting to confer immunity from the imposition of fines for infringements of Articles 101 and/or 102 TFEU

[11] Defined in section 39(9) of the Act as 'an agreement which has as its object or effect, or one of its objects or effects, restricting the freedom of a party to the agreement to determine the price to be charged (otherwise than as between that party and another party to the agreement) for the product, service or other matter to which the agreement relates'. The OFT characterised cover pricing as price fixing for this purpose in *Bid rigging in the construction industry in England*, OFT Decision of 21 September 2009, paras VI.31-VI.37.

[12] SI 2000/262.

Section 40(3) of the Act provides that a person is immune from the imposition of a penalty in respect of an infringement of the Chapter II prohibition if its 'conduct is of minor significance'. As with section 39, provision is made in section 40(4) for the OFT to withdraw that immunity if as a result of its investigation the OFT considers that the conduct is likely to infringe the Chapter II prohibition. Conduct of minor significance is defined, pursuant to section 40(1) of the Act and Regulation 4 of the 2000 Regulations as conduct by an undertaking whose turnover in the business year preceding the infringement does not exceed £50 million.

From the point of view of SMEs, sections 39 and 40 of the Act can be of considerable significance in practice. In *Cardiff Bus*[13] the OFT found that Cardiff City Transport Services Limited (trading as 'Cardiff Bus') contravened the Chapter II prohibition by engaging in predatory conduct in order to exclude its principal competitor from the local bus services market. The OFT decided, however, that, given its applicable turnover did not exceed £50 million, Cardiff Bus benefited from the immunity conferred by section 40(3) of the Act.[14] The OFT declined to withdraw the immunity from a financial penalty in the circumstances of that case, but provided no explanation for that decision. Another undertaking, W Austin and Sons (Stevenage) Limited[15], a funeral director, was found guilty of a breach of the Chapter II prohibition by the CAT but benefited from the limited immunity under section 40(3) of the Act.

2.3 SMEs under the Enterprise Act

2.3.1. De minimis exception in merger control

Under sections 22(1) and 33(1) of the Enterprise Act, it is for the OFT to conduct a preliminary assessment of anticipated or completed mergers; broadly speaking, if it considers that a merger may be expected substantially to lessen competition it must refer the case to the CC for a second stage investigation. The duties imposed by sections 22(1) and 33(1) are in each case subject to subsections (2) which entitle the OFT not to make a reference if it believes that the relevant

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[13] OFT Decision of 18 November 2008, available at www.oft.gov.uk.

[14] Ibid, paras 8.5-8.7.

[15] Case No 1044/2/1/04 *JJ Burgess & Sons v OFT* [2005] CAT 25.

markets are not sufficiently important to justify making a reference to the CC. This exception refers, of course, to the value of the market and not to the size of the companies concerned. Moreover, it is not limited to SMEs. It is clear, however, that this exception to the OFT's duty to refer may be important in practice for acquisitions by or involving SMEs.

The OFT's most recent guidance[16] on the so-called *de minimis* exception explains that where the annual value in the UK of the market(s) concerned is, in aggregate, less than £3 million, the OFT will generally not consider a merger reference to the CC justified, provided that there is in principle not a clear-cut remedy available. Where the annual value in the UK, in aggregate, of the market(s) concerned is between £3 million and £10 million, the OFT will consider whether the expected customer harm resulting from the merger is materially greater than the average public cost of a CC reference (said to be around £400,000). Where the annual value in the UK of the market is more than £10 million, the OFT considers it will generally be of sufficient importance to justify a reference. The OFT applied the *de minimis* exception in July 2011 in relation to the acquisition by Rentokil Initial of the pest control, fire and water businesses of Connaught[17].

2.4.2. Whether a market investigation reference is appropriate

The OFT has a discretion under section 131(1) of the Enterprise Act to make a market investigation reference to the CC where it has 'reasonable grounds for suspecting' that there is/are relevant features that prevent, restrict or distort competition. The OFT has published guidance setting out criteria which it takes into account when exercising its discretion as to whether or not to make a reference[18]. One of the criteria is whether the scale of the suspected problem, in terms of its adverse effect on competition, is such that a reference would be an appropriate response to it. In assessing the significance of any adverse effect on competition or

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[16] OFT1122, December 2004, available at www.oft.gov.uk.

[17] www.oft.gov.uk/shared_oft/mergers_ea02/2011/rentokil.pdf; see also Sports Universal Process SAS/Prozone Group Limited, 4 October 2011, www.oft.gov.uk/shared_oft/mergers_ea02/2011/sports-universal.pdf.

[18] *Market investigation references* (OFT 511, March 2006), available at www.oft.gov.uk.

customer detriment, the OFT will take account of the size of the market, amongst other matters. As with the *de minimis* exception in merger control, this is a market rather than a firm criterion and it is not SME-specific. That said, there have been cases in which the OFT has taken into account the small size of operators on the market in deciding not to make a reference.

In *Isle of Wight Ferry Services* the OFT noted that the combined annual turnover of the three ferry operators active on the market for Isle of Wight ferry services was £90 million[19]. In that case, however, the OFT also acknowledged that the ferry services were vital to the Isle of Wight and said that the size of the operators did not, by itself, prevent the making of a reference[20]. The OFT nonetheless declined to make a market investigation reference given the limited evidence of actual consumer detriment in terms of price, quality of service, choice or innovation.

2.3.3. Concern for SMEs in market studies

Section 5 of the Enterprise Act 2002 provides that one of the general functions of the OFT is to obtain, compile and keep under review information about matters relating to the carrying out of its functions. One of the ways in which the OFT carries out this general function is by conducting 'market studies' of markets which appear not to be working well for consumers but where enforcement action under competition or consumer law does not, at first sight, appear to be the most appropriate response. In its market study into *Homebuilding in the UK*[21] the OFT noted the importance of small homebuilders (and individuals building their own homes) for building on smaller sites which larger homebuilders would leave undeveloped. The OFT found that the homebuilding industry was broadly competitive but recommended that the Government alleviate

[19] OFT 1135, October 2009, paras 3.6 and 7.22, available at www.oft.gov.uk.

[20] Ibid, para 7.22 referring to para 2.28 of OFT 511.

[21] OFT 1020, September 2008, available at www.oft.gov.uk.

certain regulatory requirements for smaller homebuilders that might otherwise hinder the building of new homes in the UK[22].

In March 2011 the OFT published the findings of its market study into *Commissioning and competition in the public sector*[23]. The study looked at procuring a wide range of public services, including health, education, social welfare and the administration of justice. The OFT considered the role of SMEs and made recommendations to commissioners of public services in local, central and devolved government on how to devise procurement procedures that do not discriminate against smaller suppliers. To address its concerns, the OFT proposed that procurers encourage SMEs to form consortia, either between themselves or with larger suppliers, to overcome barriers to entry associated with aggregating contracts or joint procurement.

2.3.3. Market monitoring

The OFT's *Review of barriers to entry, exit and expansion in retail banking*[24] noted a concern that existing UK capital and liquidity requirements may discriminate against new entrants and smaller deposit takers, thereby placing them at a competitive disadvantage. New international capital and liquidity requirements are due to be implemented from 2013 (the so-called 'Basel III package') and some entities argued that compliance with these standards might have a disproportionate adverse effect on smaller entrants. Others took the converse view that the new standards level the playing field between smaller and larger banks. The OFT stated that it may be appropriate for the prudential regulators to consider and monitor the effect on competition of the new regulatory standards as and when they take effect.

2.4 Definition of SMEs in other areas of domestic law

Sections 382 and 465 of the Companies Act 2006 define a SME for the purpose of (less onerous) accounting and reporting requirements. The size of the company (and in the case of a parent

[22] Ibid, paras 1.9, 7.25, 7.28 and 7.32. The Government response to the OFT market study is available on the BIS website, www.bis.gov.uk.

[23] OFT 1314.

[24] OFT 1282.

company, the size of the group headed by it) in terms of its turnover, balance sheet total and average number of employees determines whether it is classed as small or medium-sized. Section 382 provides[25] that, unless excluded by section 384[26], a small company is one that has a turnover of not more than £6.5 million, a balance sheet total of not more than £3.26 million and not more than 50 employees[27]. Small companies may file abbreviated Companies Act accounts with the Registrar of Companies, under section 444 of the Companies Act, and are exempt from needing to have their accounts audited by virtue of sections 477 to 479 of that Act. Small companies which qualify for the audit exemption may file unaudited accounts with the Registrar of Companies in the form of an abbreviated balance sheet and notes[28]. Section 465 provides that, subject to certain exceptions[29], a medium-sized company has a turnover of not more than £25.9 million, a balance sheet total of not more than £12.9 million and not more than 250 employees. Medium-sized companies benefit from certain limited accounting and reporting exemptions. For example, section 417(7) of the Companies Act exempts medium-sized companies from disclosing certain non-financial information in their directors' reports.

Tax relief for expenditure on research and development by SMEs was introduced in April 2000. The provisions for the SME relief are currently contained in Part 13 of the Corporation Tax Act 2009. Putting the matter very broadly, an activity will be R&D for tax purposes if

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[25] Amended by the Companies Act 2006 (Amendment) (Accounts and Reports) Regulations 2008 SI 2008/393, which entered into force on 6 April 2008.

[26] A company is excluded from the small companies regime if it is a public company, an authorised insurance company, a banking company, an e-money issuer, an ISD investment firm or a UCITS management company.

[27] The number of employees is calculated by adding together monthly totals for the average number of persons employed under contracts of service in each month (whether throughout the month or not) and dividing by the number of months in the financial year: sections 382(4) to (7).

[28] See also the BIS and the Financial Reporting Council discussion paper, *Simpler Reporting for the Smallest Businesses*, August 2011, available at www.bis.gov.uk (considering whether the current legal and regulatory financial reporting regime for SMEs is too onerous and costly).

[29] Public companies and a company that has permission under Part 4 of the Financial Services and Markets Act 2000 to carry on a regulated activity or carries on insurance market activity do not qualify as medium-sized companies

carried on in the field of science or technology and undertaken with a view to the extension of knowledge[30]. The relief is claimed through a system of tax credits as an additional deduction for tax purposes, reducing a profit or increasing a loss (in order to reduce future taxable profits). Interestingly, the definition of SMEs for these purposes is the same definition adopted by the European Commission for the purposes of the EU State aid rules. Broadly, a company qualifies as an SME if it, and any company in which it holds 25 per cent or more of the share capital or voting rights, has fewer than 250 employees and either or both of an annual turnover not exceeding €50 million or an annual balance sheet total not exceeding €43 million[31].

2.5 Research, programmes, and policies on competition policy and SMEs

The calendar year 2005 was a prominent year for promoting UK competition policy to SMEs. In May 2005 the OFT launched a 'Championing Competition' campaign to highlight the positive aspects of competition for business and to demonstrate to SMEs that competition should be embraced rather than feared[32]. This campaign was a response to research commissioned by the OFT that showed that 49 per cent of respondents from organisations employing between ten and nineteen individuals claimed to be aware of the Competition Act[33]. This figure contrasted with 80 per cent of those from organisations with more than 200 employees which claimed to have an understanding and knowledge of competition law. The OFT considered it was important for SMEs to be aware of their rights and responsibilities under competition law 'so that they can take best advantage from competitive markets'. The OFT sought to promote awareness of competition law by liaising with UK business organisations such as the Confederation of Business Industry ('CBI') and the Federation of Small Businesses. It sought to focus, in particular, on SMEs in sectors such as healthcare markets and construction and housing markets,

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[30] Research and Development (Prescribed Activities) Regulations 2004 SI 2004/712 make provision for the Guidelines on the Meaning of Research and Development for Tax Purposes.

[31] Corporation Tax Act 2009, section 1119.

[32] OFT Press Release 92/05, available at www.oft.gov.uk.

[33] Synovate, *Competition Act and Consumer Rights*, OFT 799, April 2005, available at www.oft.gov.uk.

which were identified as priority sectors for the OFT at the time[34]. A crucial element of the campaign – forming part of its wider efforts to detect and prohibit cartels – was the OFT's policy of actively encouraging SMEs to approach it with information about cartels in return for immunity from any penalty that might otherwise have been imposed[35].

In July 2005 the OFT published further research showing that one in three of the 500 SMEs surveyed said that they were aware of anti-competitive practices in their sector and one in five SMEs felt they had been the victim of such practices[36]. The OFT research also showed, however, that SMEs understood and acknowledged the benefits of the competitive process and a market economy: 75 per cent of SMEs agreed that competition is a driver for innovation and economic growth. This research was followed in November 2005 by the OFT's 'Come Clean on Cartels' month which urged businesses, and in particular SMEs, to make a 'clean break' with any subsisting anti-competitive agreements[37]. The 'Come Clean on Cartels' month was part of the 'Championing Competition' campaign to promote competition to SMEs. Its purpose was to encourage SMEs to approach the OFT with information about cartels and avail themselves of the leniency programme.

In June 2011 the OFT published guidance on *How your business can achieve compliance*[38]. Briefly, the guidance contains a suggested risk-based four-step approach to competition law compliance. The first step is to identify the key competition law risks faced by

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[34] The OFT Annual Plan 2005-06, HC461, March 2005, p 6, available at www.oft.gov.uk.

[35] *Guidance as to the appropriate amount of a penalty* (OFT 423, December 2004), Part 3.

[36] OFT Press Release 129/05, 21 July 2005, available at www.oft.gov.uk. For the purposes of NOP World research SMEs were defined as a business employing between 10 and 250 employees, with a turnover under €50million for medium-sized companies and under €10million for small companies. See further Storey 'The Competitive Experience of UK SMEs: Fair and Unfair' (2009-2010) 17(1) Small Enterprise Research Journal 19.

[37] OFT Press Release 206/05, 2 November 2005, available at www.oft.gov.uk.

[38] *How your business can achieve compliance* OFT1341, June 2011, available at www.oft.gov.uk; on the motivation for compliance and non-compliance with competition law generally see *Drivers of Compliance and Non-compliance with Competition Law* (OFT 1227, May 2010) (excluding SMEs: ibid, paras 3.4 and 6.26).

the business. The second step is to assess how serious the identified risks are. The third step involves risk mitigation in the form of establishing policies, procedures and training to prevent the risks identified from occurring or adequately dealing with them if they do arise. The fourth step is regularly reviewing the first three steps to ensure that the business has 'an effective compliance culture'. The OFT does not consider that company competition law compliance is likely to be successful without the senior management of a business demonstrating a clear and unambiguous commitment to compliance. So far as SMEs are concerned, the OFT explains that its risk-based, four-step approach is intended to help all businesses, regardless of their size. The OFT emphasises that smaller businesses must not ignore competition law and should take appropriate compliance measures that are proportionate to their degree of risk. The OFT guidance notes that the size and structure of small businesses is likely to mean that practical means by which they ensure competition law compliance is likely to be different from those of larger businesses. For example, the necessary compliance efforts of SMEs might be less formalised and structured than that those of larger businesses. Separate, but related, initiatives include a film on competition law compliance and a *Quick Guide to Competition Law Compliance* specifically aimed at small businesses, both of which accompany and complement the guidance[39], and guidance on *Company directors and competition law*[40].

At the same time as the above initiatives on encouraging competition compliance the OFT commissioned a *Competition Law Compliance Survey*[41]. Of 2,000 businesses (of all sizes) surveyed, 95 per cent were aware of the OFT; 71 per cent claimed to know something about competition law and 25 per cent claimed to know a lot or a fair amount. The research categorised businesses according to the number of employees: up to 9 (micro business); 10 to 19 (small business) and 20 to 249 employees (medium-sized business). Micro and small businesses were found to be much more likely to lack knowledge of competition law: three in ten businesses with

[39] www.oft.gov.uk/OFTwork/competition-act-and-cartels/competition-law-compliance.

[40] OFT 1340, June 2011, available at www.oft.gov.uk.

[41] OFT 1270, June 2011.

up to four employees claim to 'know nothing' about competition law[42]. 40 per cent of medium-sized and large businesses claim to know a 'fair amount' or 'a lot' about competition law, whereas only 20 per cent of small businesses claimed to have this level of familiarity. In light of these findings, the OFT stated that it would work with business groups, including the CBI, Institute of Directors and the Trade Association Forum, in order to raise awareness of its new guidance and to disseminate the Quick Guide and the film on competition compliance[43]. As recently as December 2011 the OFT published research by London Economics which indicated that SMEs are still less likely to state that they were knowledgeable about competition law[44].

2.6 Should there be specific competition law programmes or policies for SMEs?

CLA members did not consider that there was any need to introduce competition law provisions or policies specifically for SMEs. Certain CLA members considered that it is important for the OFT to apply the *OFT's Prioritisation Principles* carefully so that its portfolio of case work would include not only cases capable of producing high impact outcomes but also appropriate cases involving smaller firms and markets. An example of the latter might be the OFT's decision, in 2002, to condemn an agreement between Arriva and First Group to share bus routes in Yorkshire[45].

The CLA members expressed their support for the ongoing work of the OFT, described in the previous section, to promote greater knowledge and awareness of competition law amongst SMEs. One member referred to the possibility that SMEs, and other companies, can apply to the OFT for guidance in the form of a short-form opinion on novel or unresolved issues of a wider interest arising in the context of a specific prospective collaborative initiative between

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[42] Ibid, para 4.3.

[43] OFT Press Release 74/11, 27 June 2011.

[44] *Assessing the Impact of Competition Intervention on Compliance and Deterrence* (OFT 1391), available at www.oft.gov.uk.

[45] OFT decision CA98/9/2002, 30 January 2002.

undertakings[46]. Reference was also made to the Competition Pro Bono Scheme[47] which was established in 2006. The members were unanimously of the view that the Scheme was a valuable resource for SMEs to enable them to obtain free independent legal advice on competition matters. From 2006 to 2010 the Scheme received 500 requests for advice, many of which were referred by the OFT and most of which concerned small companies concerned about whether they were the victims of possible infringements of the Competition Act 1998.

PART A – SMEs AS INFRINGERS

3. STATISTICS

3.1 OFT infringement decisions addressed to SMEs from 2007 to 2012

Set out below is a list of the infringement decisions which appear to have been addressed to one or more SMEs in the last five years. The companies in question 'appear to be' SMEs (applying, by analogy, the definition used by the European Commission Recommendation) as the turnover figures, and thus the size of the companies in question, have been redacted from the non-confidential version of the decisions. Apart from *Construction bid-rigging* none of the decisions were appealed by an infringing SME. Two infringement decisions, *Tobacco* and *Dairy products*, were appealed by other addressees of the decision. In *Tobacco* the CAT allowed the appeals brought by Imperial Tobacco plc and five retailers and set aside the OFT's decision in relation to those appellants (but not the non-appellant SMEs). An appeal by Tesco against the *Dairy products* decision is pending before the CAT and is due to be heard in April 2012.

In none of the cases does the legal assessment appear to have been affected by the 'economic dimension of the SME'. In some of the appeals against the *Construction bid-rigging* decision, several SMEs challenged the OFT's approach to geographic market definition (for the purposes of calculating the penalty) in so far as it led to discrimination between SMEs and firms operating on a national basis. The appellants argued that the OFT's approach discriminated against SMEs that earned a large proportion of their total turnover in the relevant markets where

[46] www.oft.gov.uk/shared_oft/press_release_attachments/SFO.pdf.

[47] For further details the CPBS website is www.probonogroup.org.uk/competition.

the infringements took place. The CAT did not accept that the OFT had discriminated against SMEs at the beginning of its penalties calculation[48]. In the CAT's view the OFT was well-aware of the fact that firms whose activities were confined to a single relevant geographic market (such as SMEs) might receive a higher fine as a proportion of their total turnover and, in some cases, adjusted the fine downwards to ensure that they would not be an 'outlier' amongst the addressees of the decision.

Decision	SME	Prohibition	Penalty	Year
Cardiff Bus	Cardiff Bus	Chapter II prohibition	None	2008
Construction bid-rigging	E.g. GAJ Construction Ltd[49]	Chapter I prohibition	£109,683 reduced on appeal to £42,750.	2009
Tobacco	TM Retail Ltd	Chapter I prohibition	£2.67 million	2010
Dairy products	Lactalis McLelland	Chapter I prohibition	£1.66 million	2011

3.2 Private actions involving SMEs from 2007 to 2012

Set out below is a list of private actions which appear to have involved one or more SMEs as defendants. As with the table of OFT decisions, the companies 'appear to be' SMEs because the

[48] Case Nos 1125/1/1/09, etc, *Barrett Estate Services Limited & Ors v OFT* [2011] CAT 9, paras 93-95.

[49] The OFT Decision found 103 undertakings had been involved in bid-rigging construction contracts, some of whom were SMEs.

precise size of the companies in question is not publicly available. Given the relative paucity of private litigation involving infringements by SMEs of EU and/or UK competition law, the table below also contains allegations of infringements on the part of SMEs.

Case	**SME**	**Type of action & Prohibition**	**Outcome**	**Year**
P&S Amusements Ltd v Valley House Leisure Ltd[50]	P&S Amusement Ltd	Competition law defence based on the Chapter I prohibition	No infringement	2006
Jones v Ricoh UK Ltd[51]	CMP Group	Competition law defence based on the Chapter I prohibition	Infringement; offending clause was declared void	2010
Pirtek (UK) Ltd v Joinplace Ltd[52]	Joinplace Ltd	Competition law defence based on the Chapter I prohibition	No infringement	2010

[50] [2007] EWHC 1494.

[51] [2010] EWHC 1743.

[52] [2010] EWHC 1641.

JJ Burgess v W Austin & Sons Ltd[53]	W Austin & Sons Ltd	Follow-on action Chapter II prohibition	Settled	2008
Wilson v Lancing College[54]	Lancing College	Follow-on action Chapter I prohibition	Settled	2009
2Travel Group plc v Cardiff Bus[55]	Cardiff Bus	Follow-on action Chapter II prohibition	Pending	Filed in 2011

4. SUBSTANTIVE RULES

4.1 Application of the Competition Act by the OFT to SMEs

4.1.1 Introduction

The competition authorities have applied the Competition Act across a number of sectors, ranging from local bus services to distribution of tobacco products, and to companies of all sizes, including SMEs. As noted above, the OFT's decision that Cardiff Bus infringed the Chapter II prohibition by intentionally sustaining losses in the short term in order to eliminate competition is another example of the Act being applied to an SME without 'uncritical sentimentality' in favour of small business[56]. An earlier high profile case in UK competition law ('*Football Shirts*')

[53] Case No 1088/5/7/08, Order of 18 February 2008.

[54] Case No 1108/5/7/08, Order of 11 February 2009.

[55] Case No 1178/5/7/11, not yet decided.

[56] See, e.g. Bork "Vertical Restraints: Schwinn Overruled" (1977) *The Supreme Court Review* 171, at 189; see also Bork *The Antitrust Paradox* (Free Press, 1978), 54.

involved the OFT fining ten undertakings of various sizes for fixing the retail prices of replica football kits manufactured by Umbro[57]. One of the infringing retailers fined by the OFT was an SME: Sportsetail Ltd which, in its first 15 months of trading up to 31 December 2000, had a total UK turnover of £174,576. Sportsetail Ltd received immunity from the fine of £4,000 that would otherwise have been imposed as it had provided the OFT with crucial information about the agreements[58].

4.1.2 Collusive tendering decisions

In February 2008 the OFT introduced a novel policy of offering rewards of £100,000 for information about cartels[59]. At the same time the OFT specifically stated that it was not simply interested in cartels involving 'big business' but also competitive harm caused by, for example, smaller contractors tendering for local government contracts. An important illustration of the OFT's determination to apply the Competition Act to SMEs just as much as to larger companies are its five decisions fining a total of 39 contractors for collusion in relation to the making of tender bids in flat roofing contracts[60]. A number of the contractors were SMEs and some of them were parties to one or more of the decisions[61]. The OFT's first decision in March 2004 in *West Midlands Roofing* is, perhaps, the most notable because it clarified the law in relation to collusive tendering and was appealed by two contractors.

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[57] OFT Decision of 1 August 2003.

[58] On appeal by another retailer, JJB Sports, Case No 1021/1/1/03 *JJB Sports plc v OFT* [2004] CAT 17, the CAT upheld most of the OFT's findings of infringement but held that JJB had not been a party to an agreement with Sportsetail and others in relation to prices charged on the England Direct website from spring 2000 to autumn 2001: ibid, paras 990-1053 (appeal on other grounds dismissed, [2006] EWCA Civ 1318).

[59] OFT Press Release 31/08, 29 February 2008.

[60] OFT Decisions of 17 March 2004 (West Midlands Roofing), 18 March 2005 (Scotland Roofing), 18 March 2005 (North East England Roofing), 12 July 2005 (Western-Central Scotland Roofing), 23 February 2006 (England and Scotland Roofing), upheld on appeal, Case No 1061/1/1/06 *Makers UK Ltd v OFT* [2007] CAT 11.

[61] See, e.g. Briggs Roofing & Cladding Ltd, Pirie Group Ltd, Rio Asphalt & Paving Company Ltd and WG Walker Ltd.

In *West Midlands Roofing* the OFT fined nine roofing contractors a total of £330,000 for infringing the Chapter I prohibition by colluding in relation to contract tender bids for the provision of repair, maintenance and improvement services for flat roofing in the West Midlands[62]. The CAT dismissed two appeals against three findings of infringement[63]. The CAT held that there had been direct contact between competitors, which had the object or effect of disclosing one bidder's intended course of conduct and which influenced the other's conduct on the market. The application of the law was not influenced by the small size of the contractors in question. Of particular interest from an SME standpoint, however, is the argument by Richard W Price (Roofing Contractors) Ltd that the penalty imposed on it of £18,000 was disproportionate. The CAT agreed with Price and reduced its penalty by 50 per cent to £9,000. The CAT took into the size of the penalties imposed on the other infringing undertakings, the relationship between those penalties and the undertakings' respective turnovers, the fact that Price had no turnover in the relevant year 1999, and the fact that Price committed one infringement[64].

The OFT decision in *Construction Bid-rigging* is a further indication of its resolve to apply the Competition Act to companies irrespective of their size. Following the largest ever investigation under the Act, lasting a total of five years, and involving over 1,000 parties at one stage, the OFT decided that 103 construction firms had infringed the Chapter I prohibition and imposed fines totalling £129.2 million. A number of SMEs were found to have engaged in illegal bid rigging activities in relation to a wide range of tendered construction projects, including tenders for schools, universities and hospitals. The OFT found, in particular, that companies had engaged in cover pricing, that is to say, collusion by one or bidders during a competitive tender process in order to obtain a price from a competitor which is not intended to win the bid but only to give the appearance of competition. 25 companies appealed to the CAT. In one of the appeals

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[62] OFT Decision of 17 March 2004.

[63] Case No 1032/1/1/04 *Apex Asphalt and Paving Co Ltd v OFT* [2005] CAT 4 and Case No 1033/1/1/04 *Richard W Price (Roofing Contractors) Ltd v OFT* [2005] CAT 5.

[64] [2005] CAT 5, paras 61-65.

against the OFT decision in *Construction bid-rigging*[65] it was argued that the OFT had discriminated against SMEs by increasing the fine on the ground that directors had been involved as SME directors are more likely than larger companies to be involved directly in cover pricing. The CAT rejected this argument and held that directors of companies of any size must be aware of their obligations to compete lawfully as:

> "it would plainly be inappropriate for the OFT to hold directors of smaller companies to a lower standard of compliance"[66].

The CAT ultimately handed down nine judgments disposing of the 25 appeals[67]. In each case (save in those cases where an appeal against a finding of infringement was successful) the Tribunal substantially reduced the penalties imposed by the OFT in the decision. Putting the matter very broadly, the CAT concluded that the fines imposed by the OFT were excessive given the nature of infringement and the mitigating factors arising from the fact that cover-pricing was a long-standing practice in the construction industry and was widely regarded as legitimate at the time[68]. The penalties were not reduced specifically on account of the small size of any infringing company, although the CAT did adjust some of the penalties on grounds of financial hardship[69].

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[65] Case Nos, etc, 1125/1/1/09 *Barrett Estate Services Ltd & Ors v OFT* [2011] CAT 8.

[66] Ibid, para 95.

[67] Case Nos 1114/1/1/09, etc, *Kier Group plc & Ors v OFT* [2011] CAT 3; Case No 1121/1/1/09 *Durkan Holdings Ltd v OFT* [2011] CAT 6; Case Nos 1117/1/1/10, etc, *GF Tomlinson Building Ltd & Ors v OFT* [2011] CAT 7; Case Nos 1125/1/1/09, etc, *Barrett Estate Services Ltd v OFT* [2011] CAT 9; Case No 1126/1/1/09 *ISG Pearce Ltd v OFT* [2011] CAT 10; Case No 1120/1/1/09 *Quarmby Construction Company Ltd v OFT* [2011] CAT 11; Case No 1118/1/1/09 *GMI Construction Holdings plc v OFT* [2011] CAT 12; Case No 1124/1/1/09 *North Midland Construction plc v OFT* [2011] CAT 14; Case No 1122/1/1/09 *AH Willis & Sons Ltd v OFT* [2011] CAT 13.

[68] See, e.g. Case Nos, etc, 1114/1/1/09 *Kier Group plc & Ors v OFT* [2011] CAT 3, paras 78 *et seq*.

[69] See, e.g. Case Nos, etc, 1117/1/1/09 *GF Tomlinson Group Ltd Ors v OFT* [2011] CAT 7, paras 222-237 (Interclass), permission to appeal to the Court of Appeal was granted by Lloyd LJ on 25 January 2012.

4.1.4 Independent Schools

The OFT's decision in *Independent Schools* was a case which involved a large number of small undertakings[70]. In November 2006 the OFT decided that 50 fee-paying independent schools had infringed the Chapter I prohibition by entering into an agreement to systemically exchange confidential information about their intended fee increases and fee levels for boarding and day pupils for three academic years, beginning in September 2001. The case was unusual for several reasons. In addition to being relatively small (in terms of revenue and number of employees), each of the infringing schools were non-profit making charities[71]. All of the schools voluntarily admitted their participation in the infringement (but did not admit that the infringement had an effect on fee levels). The schools also voluntarily agreed to make a total payment of £3 million into a charitable trust fund to benefit the pupils who attended the schools during the years of the infringement. As a consequence of these factors, the OFT decided to depart from its *Guidance as to the appropriate amount of a penalty*[72] and instead required each school to pay a nominal penalty of just £10,000.

4.1.4 Case closure decisions

The OFT has investigated alleged infringements by an SME of the Competition Act, but then decided to close the case file on grounds of administrative priority[73]. An example of this approach is the case closure decision of 2 December 2003 concerning an agreement between Brand Events and the retail exhibitors. Brand Events organises the Ordnance Survey Outdoors Show. The OFT was sent a copy of an agreement that restricted the level of discounting that could be applied by retail exhibitors in part of the Outdoors Show in 2004. In response to the

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[70] OFT Decision of 20 November 2006.

[71] This factor had no bearing on classifying the schools as undertakings (ibid, paras 1317-1320), it was considered relevant for the calculation of the penalty.

[72] OFT Decision of 20 November 2006, paras 1426-1430.

[73] See e.g. Case Closure Decision of 6 December 2011 (closing the file and accepting voluntary assurances in order to resolve competition concerns in relation to suppliers to schools in England); see OFT Press Release 130/11.

OFT's concerns, Brand Events agreed to amend the agreement to remove references to pricing and discounts. The OFT took into account the facts that Brand Events was a small company and that the agreement at issue concerned one exhibition of only a few days duration and decided that the case did not merit further action.

4.1.5 OFT Prioritisation Principles

In October 2008 the OFT adopted its *OFT Prioritisation Principles*[74] which are used to decide which projects and cases it will take on across all of its functions. In particular it will consider the direct and indirect effect on consumer welfare that intervention in a particular case is likely to have; its strategic significance, the risks and the resources involved[75]. The application of the *OFT Prioritisation Principles* has affected the investigation of certain SMEs under the Act. The OFT applied the principles in *Tobacco* when it excluded companies with a small presence in the UK tobacco sector[76]. The OFT said that it wanted to concentrate its limited resources on those parties whose activities would be most likely to cause detriment to consumers. A corollary of this administrative decision was, of course, that small and medium-sized retailers were excluded from the streamlined investigation. Similarly, in *Private Motor Car Insurance*, despite having wider concerns across the insurance sector (which includes SMEs), the OFT focused its investigation on one practice in one market involving the largest companies, namely the online exchange of future pricing information by the largest insurance companies on the UK market for private motor car insurance[77]. The investigation was closed in December 2011 when the OFT

[74] OFT 953, October 2008.

[75] Para 4.2 of the draft Prioritisation Principles (OFT 953con, September 2007) said that: "increased competition in a market serving small or medium-sized business consumers would also be considered as a positive direct impact". This was amended in the final version to say that: "the effects of increased competition in a market serving businesses would therefore also be considered as a positive direct impact": OFT 953, para 4.2.

[76] OFT Decision of 15 April 2010, para 2.100.

[77] OFT Press Release 04/11, 13 January 2011.

accepted legally-binding commitments from six insurance companies and two software and service providers pursuant to section 31A of the Competition Act[78].

4.2 Judicial application of the Competition Act to SMEs

A number of appeals to the CAT have been brought by SMEs[79]. The Tribunal's early case law under the Chapter II prohibition was concerned with smaller firms in the pharmaceutical sector who were seeking to bring new products to the market for benefits to the consumers in the face of allegedly abusive practices of dominant firms. For example, in *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*[80] the CAT upheld the OFT's decision that Napp, a virtual monopolist, had infringed the Chapter II prohibition by offering below-cost prices to UK hospitals and doing so selectively on those drugs where it faced competition from smaller competitors[81]. The CAT found that the effect of Napp's pricing policy in foreclosing competition in the hospital segment was significant[82]. In *Genzyme Ltd v Office of Fair Trading*[83], another Chapter II case involving protection of an SME from an abuse of dominance in the pharmaceutical sector, the CAT held that Genzyme had abused its dominant position by supplying a drug to a small provider of homecare services at a price that did not allow them to trade profitably regardless of how efficient they may be; a practice known as an abusive "margin

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[78] www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/closure/motor-insurance.

[79] In addition to the *Burgess*, *Albion Water*, *Brannigan* and *Cityhook* cases discussed in the text below, see also Case No 1006/2/1/01 *BetterCare Group Ltd v Director General of Fair Trading* [2002] CAT 7; Case No 1024/2/3/04 *Floe Telecom Ltd v Director General of Telecommunications* [2004] CAT 18; Case No 1068/2/1/06 *Casting Book Ltd v OFT* [2006] CAT 35; Case No 1027/2/3/04 *VIP Communications Ltd v OFCOM* [2009] CAT 28.

[80] Case No 1001/1/1/01 [2002] CAT 1.

[81] Ibid, para 228.

[82] During the period of infringement there was only one other competitor, Link, a SME with an annual turnover of £6.7 million, who had managed to acquire and maintain a "toehold" in the market (4 per cent of the total market): see paras 16 and 284.

[83] Case No 1016/1/1/03 [2004] CAT 4.

squeeze"[84]. The CAT concluded that the effect, or potential effect, of Genzyme's pricing policy was to foreclosure the market for the supply of homecare services to patients[85]. The CAT rejected Genzyme's justification for its conduct – that it could provide homecare services more efficiently itself – and preferred the evidence of doctors and patients to the effect that they wished the smaller provider of homecare services to continue[86]. In *Napp* and *Genzyme* the CAT clearly considered that the Chapter II prohibition should be applied to maintain an effective competitive structure in the market including, where appropriate, the protection of smaller competitors. Two further appeals involving Chapter II are of particular interest: the first concerned an SME as a defendant (*Burgess v OFT*) and the second involved an SME as a third party appellant (*Albion Water*). The remainder of this section discusses those appeals.

4.2.1 Burgess v OFT

The first case involved a dispute between two family-owned funeral directors which operated in Hertfordshire: *JJ Burgess v OFT*[87]. JJ Burgess & Sons complained to the OFT that it had been unlawfully refused access to crematoria services at Harwood Park crematorium, which was owned by a competing funeral director, W Austin & Sons (Stevenage) Limited. The OFT rejected the complaint as it considered Austin was unlikely to be dominant in the supply of crematoria services to funeral directors in the Hertfordshire area and, moreover, Austin's refusal to supply was unlikely to substantially harm competition. On appeal the CAT set aside the OFT's decision on the basis that it had defined the relevant geographic market too broadly and that it had misapplied the law on abuse of a dominant position. The CAT held that Austin had abused its dominant position for crematoria services in the Stevenage/Knebworth area by unjustifiably refusing to provide Burgess with access to Harwood Park crematorium. A factor which clearly influenced the CAT in deciding to make its own decision was that the facts of this

[84] Ibid, para 552.

[85] Ibid, paras 555 and 575.

[86] Ibid, paras 584-585.

[87] Case No 1044/2/1/04 [2005] CAT 25.

case concerned SMEs serving a vulnerable class of consumer and which had been subject to a long-running administrative procedure[88]. There are two further points of interest for SMEs, one substantive and one procedural, arising from the judgment of the CAT.

The substantive point arose in connection with the CAT's consideration of the purpose of the Chapter II prohibition. While broadly accepting the OFT's submission that the aim of the Chapter II prohibition is not to protect competitors but to protect competition the CAT also said that:

> '*... where effective competition is already weak through the presence of a dominant firm, there are circumstances in which competition can be protected and fostered only by imposing on the dominant firm a special responsibility under the Chapter II prohibition not to behave in certain ways vis-à-vis its remaining competitors, particularly where barriers to entry are high. In such circumstances the enforcement of the Chapter II prohibition may in a sense "protect" a competitor, by shielding the competitor from the otherwise abusive conduct of the dominant firm. However, that is the necessary consequence of taking action in order to protect effective competition*.'[89]

In the CAT's view one of the principal functions of the Chapter II prohibition, in its view, is to protect the competitive process in which dominant firms may be challenged by effective competitors, including in local markets[90]. This is clearly beneficial to SMEs wishing to challenge and prevent the anti-competitive practices of undertakings with substantial market power[91]. The second (procedural) point arising from the judgment in *Burgess* concerned the CAT's comment that cases involving SMEs operating in local markets should be dealt within a reasonable period of time. The relevant passage of the judgment speaks for itself and is worth quoting in full:

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[88] Ibid, para 139.

[89] Ibid, para 332.

[90] Ibid, para 334.

[91] See also Case No 1008/2/1/02 *Claymore Dairies Ltd v Office of Fair Trading* [2005] CAT 30, para 307 (rejecting the existence of any de minimis exception to the rule in Case 85/76 Hoffmann–La Roche v Commission [1979] ECR 461 that loyalty inducements in return for single supplier status by a dominant undertaking is an abuse of a dominant position).

'*We observe, finally, in the procedural context that this case involved small or medium sized businesses operating in local markets. Competition issues arising in such markets can be important for the participants and for local consumers. Often the OFT represents the only viable route for enforcing the Act in such contexts, given the difficulty for smaller undertakings of obtaining the necessary market information or supporting the costs of legal proceedings. We hope the OFT may take the opportunity to review its procedures to ensure that such cases can be dealt with within an acceptable time frame*.'[92]

4.2.2 Albion Water v Water Services Regulation Authority

The second case in which the Chapter II prohibition has been applied in a case involving an SME is *Albion Water v Water Services Regulation Authority*[93]. In that case, a new entrant, Albion, sought access to distribute water over a pipeline belonging to another water company, Dŵr Cymru. Albion alleged that the access price and terms quoted by Dŵr Cymru did not enable it to achieve a reasonable margin between its costs and proposed retail prices. OFWAT rejected Albion's complaint that the access price was excessive and/or gave rise to a margin squeeze contrary to the Chapter II prohibition. On appeal the CAT held that OFWAT had provided inadequate and erroneous reasons for reaching its non-infringement decision. The CAT went on to find that Dŵr Cymru held a dominant position and that it had abused that position both by imposing an abusive margin squeeze[94] and proposing an excessive access price[95]. In particular the CAT rejected OFWAT's methodology (the so-called efficient component pricing rule or ECPR[96]) to determine whether the access price proposed by Dŵr Cymru was abusive[97]. OFWAT's approach had been concerned to avoid encouraging inefficient entry to the relevant

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[92] Ibid, para 390.

[93] Case No 1046/2/4/04 [2006] CAT 23 and [2006] CAT 36, upheld on appeal, *Dŵr Cymru Cyfyngedig v Albion Water Ltd* [2008] EWCA Civ 536. Albion Water has brought a claim for damages 'following on' from the CAT's infringement decision: Case No 1166/5/7/10, not yet decided.

[94] [2006] CAT 36.

[95] [2008] CAT 31.

[96] The ECPR is an equation in which the access price is given by the incumbent's final product price less the costs it would avoid by providing access: ibid, para 639. The ECPR is also known as a 'retail-minus' approach.

[97] Ibid, paras 722 *et seq*.

market, whereas the CAT emphasised the benefits of a dynamic process of competition which may outweigh any short term costs imposed by entry upon the market. The CAT said that:

> '*there is a potential clash between the narrow short run productive efficiency sought in theory through ECPR, and the wider dynamic competition benefits and level playing field which the Chapter II prohibition is designed to safeguard. At the very least, a pricing policy which insulates the incumbent in perpetuity from competition; which requires the new entrant to support the incumbent's overheads as well as its own, and to indemnify the incumbent indefinitely against any loss of revenues (except as regards "avoided costs"); and which requires the new entrant to be "super-efficient" as compared with the incumbent requires close scrutiny under the Chapter II prohibition.*'[98]

The CAT concluded that the particular way the ECPR had been applied in the *Albion* case could not be safely relied on as it would preserve excessive retail prices and would preclude any effective competition in the relevant market. The CAT's judgment is clearly specific to the particular facts and circumstances of the water industry in general and the *Albion* case in particular. It is not unreasonable to suppose, however, that the CAT considered that there are markets in which a new SME may add to the total costs of supply in the short run, but should be protected by the Chapter II prohibition on the basis of their potential contribution to effective competition in the long run. This view is consistent with the point made by the Tribunal in *Burgess* that the protection of the competitive process under the Chapter II prohibition may involve having regard to the situation of the competitors of a dominant undertaking, in order to protect competition for the benefit of consumers[99].

4.3 Effect on trade of the conduct of SMEs

4.3.1. Effect on trade between Member States

The European Commission has published a Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) TFEU[100] ('De Minimis Notice') and

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[98] Ibid, para 802.

[99] See, to that effect, the interim judgment of the CAT in Case No 1046/2/4/04 [2005] CAT 40, para 262.

[100] OJ 2001 C368/13, para 3.

Guidelines on the effect on trade concept contained in Articles 101 and 102 TFEU[101] ('Effect on Trade Guidelines'), both of which refer to SMEs as defined in the Annex to Commission Recommendation 2003/361/EC[102]. Both Notices state that agreements between small and medium-sized undertakings are rarely capable of appreciably affecting trade between Member States. The Commission has explained that the reason for this view is the fact that the activities of SMEs are normally local or at most regional in nature[103]. It is, of course, a matter of EU law whether this view is correct. When applying Articles 101 and 102 TFEU in the UK, it is likely that the domestic competition authorities and courts will adhere to the Commission's considered view that the conduct of SMEs is unlikely to affect inter-state trade.

4.3.2. Effect on trade within the UK

A material difference between Articles 101 and 102 TFEU and their UK equivalents is that the latter do not require an effect on trade between Member States; they apply when an agreement and/or conduct affects trade within the UK. Section 60 of the Competition Act contains provisions designed to maintain consistency between EU competition law and decisions adopted under the Act. Section 60(3) provides that the domestic competition authorities and courts must 'have regard to' any relevant 'decision or statement' of the European Commission[104]. The De Minimis Notice and Effect on Trade Guidelines both carry the authority of the Commission and therefore qualify as 'statements' for the purposes of section 60(3). The domestic competition

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[101] OJ 2004 C101/81, para 50.

[102] OJ 2003 L124/36: Small undertakings are defined in that recommendation as undertakings which have fewer than 50 employees and have either an annual turnover not exceeding €10 million or an annual balance-sheet total not exceeding €10million. Medium-sized undertakings are defined as those which have fewer than 250 employees and have either an annual turnover not exceeding €50 million or an annual balance-sheet total not exceeding €43million.

[103] OJ 2004 C101/81, para 50.

[104] Note that section 60(2) imposes a stronger obligation to maintain consistency between the principles applied and the decision reached by the domestic authority and the principles laid down by the Treaty and the EU Courts and any decisions of the EU Courts in determining corresponding questions of competition law.

authorities and courts will 'have regard to' the Commission's views when determining whether the conduct of SMEs 'may affect trade' within the UK.

In *Aberdeen Journals Limited v Office of Fair Trading*[105] the CAT held that there was no requirement to show that the impugned conduct has an appreciable effect on trade within the UK. The requirement of appreciability is understood in EU law as a jurisdictional requirement which demarcated the boundary line between the application of EU competition law and national competition law, a demarcation unnecessary under the Chapter II prohibition[106]. This could lead to some divergence in the way in which the Chapter I and II prohibitions and Articles 101 and 102 are applied. The Tribunal's decision extends the territorial scope of the Competition Act to the activities of smaller operators in local markets. The High Court has expressed doubt about the correctness of the Tribunal's decision, at least in the context of Chapter I prohibition cases[107]. The High Court has stated that the Chapter I prohibition necessarily requires it to be shown that the relevant agreement had a more than a *de minimis* effect on trade within the UK[108]. The High Court's approach would mean fewer SMEs in local markets would be caught by the Act. There is therefore a conflict of authority on whether it is necessary to prove that an appreciable effect on trade within the UK and thus the extent to which the local activities of SMEs are subject to the Competition Act.

4.4 Safe harbours for SMEs

There are no safe harbours for SMEs from liability under the Competition Act. The OFT has, however, published sector-specific guidance on how competition law applies to co-operation

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[105] Case No 1009/1/1/02 [2003] CAT 11.

[106] Ibid, paras 459-460.

[107] *P&S Amusements Ltd v Valley House Leisure Ltd* [2006] EWHC 1510, para 22 per the Chancellor of the High Court and in *Pirtek (UK) Ltd v Joinplace Ltd (t/a Pirtek Darlington)* [2010] EWHC 1641, paras 61-62 per Briggs J.

[108] Ibid. Cf. Case No 1124/1/1/09 *North Midland v OFT* [2011] CAT 14, para 49 (the reasoning in *Aberdeen Journals* applies equally to the effect on trade requirement in the Chapter I prohibition).

between farming businesses[109], to the exchange of information between independent schools[110] and to the bus sector[111] refer to circumstances in which agreements may fall outside the Act if the parties have an insignificant share of the market. As noted above, the OFT also has regard to the Commission's De Minimis Notice[112].

5. PROCEDURAL ASPECTS

5.1 Procedural rights of SMEs before the OFT

The competition authorities apply the same procedures to SMEs as they do to other entities when investigating suspected infringements of the Act. As noted above, the *OFT's Prioritisation Principles*[113] are used to determine whether the OFT should intervene under the Act and do not distinguish between large or small companies. This is, presumably, because cases which are of a high priority to the OFT may involve large and/or small operators. In March 2011 the OFT published *A guide to the OFT's investigation procedures in competition cases*[114] as part of a series of initiatives to improve the transparency and efficiency of its investigations under the Competition Act[115]. The *Guide* discusses the OFT's approach to the major steps in any investigation under the Act, including the handling of third party complaints[116], access to the file[117], and possible outcomes of an investigation[118]. The *Guide* does not distinguish SMEs from

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[109] OFT 740rev, November 2011.

[110] OFT 444, June 2004.

[111] OFT 452, March 2009, paras 4.14-4.15.

[112] *Agreements and concerted practices*, OFT 401, December 2004, paras 2.15-2.18.

[113] OFT 953, October 2008.

[114] OFT 1263.

[115] See, eg *Transparency: A Statement on the OFT's Approach* OFT 1234, June 2010.

[116] OFT 1263, March 2011, paras 3.11 *et seq*. See also *Involving third parties in Competition Act investigations*, OFT 451, April 2006, Annexe A (guidance on making complaints).

[117] OFT 1263, March 2011, paras 11.19-11.21 (offering recipients of a statement of objections six to eight weeks to inspect copies of documents on the OFT file). In *Involving third parties in Competition Act investigations*, OFT 451,

other entities which may be the subject of, or involved in, an investigation. The OFT's guideline on its *Powers of Investigation* indicates that when setting a time limit for the submission of documents or information during an investigation under the Act, the OFT will consider, amongst other matters, the resources available to the individual or undertaking[119]. Beyond this, however, it is not possible to list situations in which the procedural rights of SMEs differ from those afforded to larger companies.

In March 2011 the Government launched a wide-ranging consultation on options for reforming the UK competition regime[120]. Among the options was a proposal to provide SME bodies with a mechanism to address features in a market that have an impact on competition that significantly harms the ability of SMEs to compete[121]. Section 11 of the Enterprise Act currently enables certain consumer bodies[122] to make a 'super-complaint' to the OFT about features of a market which appear to be significantly harming the interests of consumers and the OFT is required, by law, to respond within 90 days setting out what action, if any, it intends to take. In order to guard against SME super-complaints challenging efficient practices the Government noted that the eligibility of SMEs for super-complainant status might need to be limited and the substantive test to harm caused to small enterprises generally, rather than to an individual SME.

The OFT did not support the Government's proposal in its formal response to the consultation in June 2011[123]. The OFT considered that extending the system of super-complaints

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April 2006, para 3.22 the OFT states that formal complainants and other third parties (including SMEs) will generally not be given access to documents other than the non-confidential version of a statement of objections.

[118] OFT 1263, March 2011, Chap 10.

[119] OFT 404, December 2004, para 3.11.

[120] *A competition regime for growth: a consultation on options for reform*, available at www.bis.gov.uk.

[121] Ibid, paras 3.14-3.16.

[122] In order to be eligible to make a super-complaint a consumer body must be designated by the Secretary of State. A list of the designated consumer bodies is available at www.bis.gov.uk.

[123] OFT 1335, June 2011, paras 2.13-2.15.

could chill competition in markets by allowing small business groups to challenge business practices which might be pro-competitive and efficiency-enhancing. In the OFT's view there would be a risk of misalignment between the interests of an SME super-complainant and the role of the competition authority in promoting competition in the interests of consumers and the wider economy. The OFT also noted that bodies representing the interests of SMEs can already make complaints and request the OFT to carry out enforcement action and/or conduct a market study. The CC took a different view in its response to the consultation and stated that a system of SME super-complaints might help competition authorities to identify suitable markets for investigation[124]. The CC noted that such a system would need to be carefully designed to minimise the risk of diverting the priorities and resources of the competition authority. On 15 March 2012, however, the Government announced its decision not to extend the super-complaint mechanism to SMEs[125].

The questionnaire raises the question whether some or all of the 'human rights' and freedoms of legal persons should differ from those given to natural persons. In *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading*[126] the CAT held that proceedings against undertakings under the Act that may lead to the imposition of a penalty are "criminal" for the purposes of Article 6 of the European Convention of Human Rights[127]. In those circumstances, undertakings have the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law under Article 6(1), to the presumption of innocence under Article 6(2), and to the rights envisaged by Article 6(3). An important further right in practice is the privilege against self-incrimination. The OFT has

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[124] Competition Regime for Growth: a consultation on options for reform, Response by the Competition Commission, 13 June 2011, p 7 available at www.competition-commission.org.uk.

[125] *Growth, competition and the competition regime: Government response to consultation*, 15 March 2012, paragraph 4.9, available at www.bis.gov.uk.

[126] Case No 1001/1/1/01 [2002] CAT 1, paras 98-99.

[127] Cmd 8969, 1953.

indicated[128] that it applies a similar degree of protection in the UK as in EU law[129], whereby the OFT may not compel an undertaking to provide it with answers which might involve admissions of an infringement.

5.2 Procedural rights of SMEs before the CAT

Section 47 of the Competition Act provides for appeals to the CAT by third parties who have 'a sufficient interest'. The Tribunal has said that the persons who seek to appeal under section 47 are very often complainants, who are competitors of another undertaking, and that most of them have 'a sufficient interest' for the purposes of section 47[130]. The CAT has repeatedly emphasised the role that third party complainants, which have often been SMEs, play in the enforcement of the Act[131]. In *Freeserve.com v Director General of Telecommunications*[132] the Tribunal acknowledged that:

> '*many complainants will face the difficulty that the [OFT] will normally have much greater access to the facts than they do. That is particularly true of the specialist regulators, such as the [OFT] in this case. In addition, some complainants may be small- and medium-sized enterprises, without access to legal advice and only a rudimentary knowledge of the sometimes complex issues of competition law*
>
> …
>
> *For a complainant who lacks resources, it should normally be possible at least to explain in plain business terms how a particular course of conduct adversely affects the complainant's own ability to compete in the market, with supporting information about its own business, without necessarily embarking on any complex legal analysis.*'[133]

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[128] OFT 404, December 2004, para 6.6.

[129] Case 374/87 *Orkem v Commission* [1989] ECR 3343, paras 34-35.

[130] Case No 1017/2/1/03 [2004] CAT 10, para 196.

[131] See, eg Case No 1017/2/1/03 *Pernod Ricard v OFT* [2004] CAT 10, paras 197 and 229 and Case 1071/2/1/06 *Cityhook Ltd v OFT* [2007] CAT 18, para 203.

[132] Case No 1007/2/3/02 [2003] CAT 5.

[133] Ibid, paras 114-115.

Given the above challenges for SMEs the CAT had been willing to adapt its procedures and practice to accommodate the limited resources of SMEs. This 'procedural flexibility' can be seen in rulings on matters ranging from applications to amend a notice of appeal[134], to award costs [135], and to obtain security for costs in a damages claim[136]. Indeed in the early days of the Act the CAT declined to apply a general or rigid rule to the effect that unsuccessful appellants should be liable to pay the OFT's costs, as well as their own, as such a rule might deter some appeals, in particular brought by SMEs[137]. The CAT held that such a rule would be 'seriously counter-productive from the point of view of achieving the objectives of the Act, particular as regards smaller companies, representative bodies and consumers'[138]. The CAT maintained this SME-friendly approach to the issue of costs in the *West Midlands Roofing* appeals in 2005[139]. In 2011, however, the CAT indicated that the 'starting point' in all types of appeals under the Act[140] is that the successful party should obtain a costs award in its favour[141].

The CAT has interpreted its rules and procedures in order to ensure smaller companies may have recourse to the Tribunal in appropriate circumstances. This approach appears to have influenced the CAT's rather expansive approach to its jurisdiction to hear appeals against implicit

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[134] Case No 1024/2/3/04 *Floe Telecom Ltd v Office of Communications* [2004] CAT 7, para 43, noting that appeals are brought by well-funded major companies and 'by small companies, or even sole traders, and with few resources, little or no access to legal advice, but having a genuine sense of grievance' and emphasising the need to manage cases appropriately); see also para 50.

[135] Case No 1032/1/1/04 *Apex Asphalt and Paving Co Ltd v OFT (costs)* [2005] CAT 11, para 25.

[136] Case No 1028/5/7/04 *BCL Old Co Ltd v Aventis SA* [2005] CAT 2 (declining the defendants' request that the claimants should be required to give security for costs).

[137] Case Nos 1002-4/2/1/01 *Institute of Independent Insurance Brokers v Director General of Fair Trading* (costs) [2002] CAT 2, para 54.

[138] Ibid.

[139] Case No 1032/1/1/04 *Apex Asphalt and Paving Co Ltd v OFT (costs)* [2005] CAT 11, para 25.

[140] This applies both to penalty-only appeals and appeals against liability for an infringement of the Act.

[141] Case Nos 1140 and 1142/1/1/09 *Eden Brown Ltd v OFT* (costs) [2011] CAT, paras 3-18, in particular para 18.

non-infringement decisions under the Act. For example in *BetterCare*[142] the CAT disagreed with the OFT's finding that a health care trust was not acting as an undertaking when it provided and outsourced the provision of social care services for the elderly in Belfast. Had these activities fallen outside the scope of the Act, the CAT was concerned that BetterCare would not have had an adequate legal remedy[143]. Similarly, in its judgments in *Burgess* and *Albion*, discussed above, the Tribunal was concerned that a small company had failed to obtain redress from the relevant competition authority and decided to make its own infringement decision. The importance of procedural flexibility for SMEs can also be seen in the CAT's handling of an appeal by a sole trader against an implicit non-infringement decision of the OFT in *Brannigan v OFT*[144]. The CAT held that the trader (who represented himself) should be permitted to challenge a decision of an OFT and also that he should be given an opportunity to clarify his grounds of appeal[145]. It was, of course, subsequently up to the appellant to formulate his case, but the Tribunal expressed the hope that he might be assisted by the Competition Pro Bono Service[146]. The CAT ultimately dismissed the trader's appeal, but the way in which it managed the appeal shows its willingness to enable SMEs and individuals to have access to the Tribunal.

5.3 Sanctions for infringements of competition law

The subject of penalties for infringements of competition law in the United Kingdom was covered in the UK report for the LIDC Oxford Congress in 2011, and the detail is not repeated here. For present purposes it is sufficient to note that sections 36(1)-(3) of the Competition Act provide that the OFT (or a sectoral regulator) may impose a financial penalty on an undertaking where either intentionally or negligently it has infringed Articles 101 and/or 102 TFEU and/or the prohibitions in the Act. The financial penalties that may be imposed do not formally differ for

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[142] Case No 1006/2/1/01 *BetterCare Group Ltd v Director General of Fair Trading* [2002] CAT 7.

[143] Ibid, para 261.

[144] Case No 1073/2/1/06 *Brannigan v Office of Fair Trading* [2006] CAT 28.

[145] Ibid, para 82.

[146] www.probonogroup.org.uk/competition/index.php.

SMEs as opposed to other entities. Any penalty imposed by the OFT must not exceed 10 per cent of the worldwide turnover of the undertaking in the business year preceding the OFT's decision[147].

As already noted, the Competition Act provides for a party to a 'small agreement' is immune from the imposition of a financial penalty in respect of an infringement of the Chapter I prohibition (but not Article 101(1)). There is an equivalent limited immunity from penalties for infringements of the Chapter II prohibition (but not Article 102) by a dominant undertaking which has engaged in 'conduct of minor importance'. It should be noted that, even where limited immunity from fines is applicable, the OFT has reserved the right to apply to the court for an order disqualifying a company director from office for up to 15 years[148].

The questionnaire asks for examples of domestic cases in which a larger company provided a competition authority with information about a cartel and obtains immunity from any fine that might otherwise have been imposed, whereas an SME was fined for its participation in the same cartel. The *West Midlands Roofing* case, discussed above, is an example of that situation in which a larger company was granted immunity, whereas a smaller company was fined, although all of the companies involved in that case were of a relatively small size. The same point may also apply in *Tobacco* where a large grocery retailer, Sainsbury's, obtained leniency in respect of the infringing price-matching agreements, whilst a couple of much smaller retailers, such as, perhaps, TM Stores, were fined[149].

5.4 Should the UK leniency programme contain SME-specific provisions?

The CLA members did not consider that the UK leniency programme should be amended to included SME-specific provisions. The members acknowledged that certain SMEs may well be disadvantaged in the race to 'blow the whistle' on a cartel to the extent that they have limited

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[147] Competition Act 1998, s 36(8).

[148] *Director disqualification orders in competition cases*, OFT 510, June 2010, para 4.11.

[149] Note, however, that the turnover of the retailers in question was redacted from the non-confidential version of the published decision.

resources and/or lack knowledge of competition law. Certain CLA members pointed out, however, that as and when an SME does become aware that it has been involved in cartel activity, it might actually be easier and quicker for it to seek a marker for leniency than a large, possibly bureaucratic, multinational firm.

5.5 Protection of SMEs during investigations under the Act

There are no rules that specifically protect SMEs from reprisals by a larger company in response to an SME complaint about that company's behaviour to a competition authority. Section 35 of the Act, however, gives the OFT (or a sectoral regulator) power over undertakings (of all sizes) suspected of having infringed the Act. Section 35(2) of the Act provides that, in urgent situations, the OFT may impose such interim measures as it considers appropriate for the purpose either of preventing serious, irreparable damage to a particular person or category of person or of protecting the public interest. The power under section 35 has been exercised sparingly in practice[150].

In March 2012 the Government decided to propose legislation amending section 35(2)(a) to enable the OFT to intervene where there is a perceived need to act for the purpose of preventing significant damage to a particular person or category of persons, which is clearly a lower threshold than the existing requirement to demonstrate 'serious, irreparable damage'[151].

5.6 Should 'protection mechanisms' be introduced to improve the ability of SMEs to report anti-competitive behaviour?

Four points were raised and discussed at the CLA roundtable on this issue. The CLA members considered that, first of all, in some cases an aggrieved SME might have no qualms about having

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[150] From 1 March 2000 to 1 March 2012 the power under section 35 has been used once in *London Metal Exchange*, OFT direction of 27 February 2006 which was subsequently withdrawn on 15 May 2006: see generally Case No 1062/1/1/06 *London Metal Exchange v OFT (costs)* [2006] CAT 19.

[151] *Growth, competition and the competition regime: Government response to consultation*, 15 March 2012, paragraphs 6.61-6.66, available at www.bis.gov.uk.

its identity disclosed when it reports anti-competitive behaviour[152]. Secondly, the CLA members noted that there may be cases in which a complainant, whether an SME or a larger company, may be legitimately concerned about the risk of reprisals for divulging anti-competitive behaviour. Whether there will be such a risk will naturally depend on the nature of the industry in question, the type of infringement being alleged and will ultimately be a question of fact to be determined in the particular circumstances of each case. Thirdly, one of the CLA members referred to the OFT's infringement decision in *Lladró Comercial*[153] as an example of a case in which the OFT had relied on anonymised evidence. There, the OFT held that Lladró, a Spanish porcelain producer, had entered into unlawful distribution agreements which prevented retailers from selling below the recommended resale price. The OFT rejected Lladro's argument that it had been contrary to Article 6 of the European Convention on Human Rights and to its rights of defence for the OFT to rely on evidence from complainants whose identity had not been disclosed. In the OFT's view, it was entitled to rely on anonymous evidence in circumstances where it considered that Lladro's rights of defence had been respected and the legitimate commercial interests of the complainants would be harmed by disclosing their identity. Fourthly, the CLA members noted that earlier this year, in the context of a private action for damages, the CAT refused an application by a claimant to anonymise witness evidence because it was not satisfied that the subjective concerns of the individual witness outweighed the objective considerations of open justice[154].

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[152] See e.g. the complaint made by Cityhook Ltd to the OFT about an alleged collective boycott in *R (Cityhook Ltd and Cityhook(Cornwall) Ltd v Office of Fair Trading* [2009] EWHC 57.

[153] OFT Decision of 31 March 2003.

[154] Case 1178/5/7/11 *2 Travel Group plc (In liquidation) v Cardiff City Transport Services Limited* [2012] CAT 7.

PART B – SMEs AS VICTIMS

6. PRIVATE ENFORCEMENT OF THE COMPETITION ACT AND ARTICLES 101 AND 102 TFEU

6.1 Procedural difficulties facing prospective claimants

There are to date no examples of SMEs having obtained final damages for an infringement of competition law, although, of course, most cases settle and the details of settlements are generally kept confidential. There has been one monetary claim, *Healthcare at Home v Genzyme Limited*[155], in which the CAT made an interim award of damages of £2 million, and then subsequently the case was settled out of court. The typical difficulties for victims of anti-competitive behaviour are well-known and include, for example, the difficulties for claimants to prove to the satisfaction of the court the facts necessary to substantiate their claim and the costs, delays and burdens of court proceedings. The risk of having to pay the defendant's costs (in some cases as well as the claimant's own costs) if an action is unsuccessful can be a particularly significant deterrent. A further obstacle to private enforcement in some cases can be that the immediate customers of a cartel (or a dominant undertaking) will have passed the cartelised (or monopolised) price on to its own customers, in which case the defendant may have a defence, that the claimant has suffered no harm and can recover nothing. It should be noted, however, that the existence of a passing-on defence has yet to be decided in English law.

6.2 Specific rules to protect SMEs in civil litigation

There are currently no specific rules of civil procedure that apply solely to SMEs. However, in 2007, the OFT made recommendations to the Government as to how to improve the effectiveness of the private enforcement of competition law in the UK. In particular the OFT recommended that the Government should consult on whether, and how, to allow representative bodies to bring stand-alone and follow-on representative actions for damages and injunctions on behalf of small businesses in competition law cases. The OFT noted some of the evidential and cost-related difficulties encountered by SMEs seeking private redress. In the OFT's view SMEs should be on

[155] Case 1060/5/7/06 *Healthcare at Home v Genzyme Ltd* [2006] CAT 29.

an equal footing with consumers and big business in relation to their ability to seek redress for anti-competitive conduct.

6.3 Should there be SME-specific provisions in private actions?

In April 2012 the UK Government launched a public consultation on options for reform of the law governing private actions in competition law[156]. The objective of the proposed reforms is to increase the ability of both consumers and businesses who have suffered loss as a result of anti-competitive behaviour to obtain redress. Foremost amongst the options is the proposal to extend the jurisdiction of the CAT so that it could hear actions for damages, whether they are brought in reliance on a prior infringement decision or not[157], and also applications for injunctions. The Government has stated that it proposes to establish the CAT "as a major venue for competition actions in the UK, to make it easier for businesses, especially SMEs, to challenge anti-competitive behaviour that is harming them"[158]. The Government is also considering whether to introduce a "fast track" procedure for SMEs to enable them to bring actions before the CAT. In particular, such a procedure could enable SMEs to apply to the CAT in order to obtain injunctive relief, a speedy trial on the merits and a cap on their cost liabilities[159]. This process, it is hoped, will make it cheaper, quicker and simpler for SMEs to have access to courts in order to challenge anti-competitive behaviour. At the time of the meeting on 14 May 2012, the CLA members were not in a position to express a single or concluded reaction to these proposals. The Government has invited responses to its consultation by 24 July 2012.

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[156] Private actions in competition law: a consultation on options for reform, April 2012.

[157] This is intended to address the "unfulfilled potential" of the CAT to hear follow-on actions only: ibid, para 4.14.

[158] Ibid, para 3.20.

[159] Ibid, paras 4.24-4.35.

6.4 Existing mechanisms for collective redress

Multi-party litigation in England and Wales is typically managed by the High Court using two main procedures: representative actions and group litigation orders ('GLOs')[160]. Separately, there is a provision in the CAT for representative actions under section 47B of the Competition Act. Each of these procedures will be discussed in turn.

6.4.1. Representative actions in the High Court

Representative actions are ones in which a named claimant or defendant may act on his or her own behalf and also on behalf of a class of individuals under rule 19.6 of the Civil Procedure Rules ('CPR'). This procedure can only be used when the class sought to be represented has a common interest and a common grievance, and the relief sought must in its nature be beneficial to all of them. In *Emerald Supplies v British Airways* the claimants, importers of cut flowers, wanted to bring a representative action, on behalf of themselves and on behalf of all other direct or indirect purchasers, to recover damages from BA for losses caused by the *Air Cargo* price fixing cartel[161]. This was a way of funding the litigation as the more claimants involved, the more there is to be distributed at the end of the case. However, the Chancellor of the High Court[162], with whom the Court of Appeal agreed[163], held that the claimants and the 178 additional claimants they purported to represent did not share 'the same interest' required by rule 19.6. It was not possible at the time the claim was issued to say of any individual whether he or she was a member of the (putative) class, as their inclusion in the class would depend upon the outcome of the action itself. A further difficulty was that the members of the class that Emerald purported to represent did not have the same interest in recovering damages where, for example, the 'passing

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[160] It is also possible to apply to the court to consolidate multiple actions into a single case with multiple parties under CPR, r 3.1(2)(g).

[161] Commission Decision of 9 November 2010, on appeal to the General Court, Cases T-9/11, etc, Air Canada v Commission, not yet decided.

[162] [2009] EWHC 741.

[163] [2010] EWCA Civ 1284.

on defence' was available in answer to the claims of direct purchasers but not those of indirect purchasers. The Chancellor suggested that it would have been more appropriate for multiple actions to be dealt with by using the GLO procedure[164].

6.4.2 Group Litigation Orders

The GLO procedure provides another way of handling multiple actions based on the same or similar facts. GLOs are governed by rules 19.10-15 of the CPR and are 'opt in' in nature, so that all claimants must be identified and be parties to the proceedings. A GLO enables the court to manage multiple claims by, for example, issuing stays of related claims, appointing a managing judge and a lead solicitor, the identification of common issues and test claims and delivering binding judgments. It is understood that the High Court has ordered a GLO in one competition law case: *Prentice v DaimlerChrysler UK Ltd*. Prentice was one of a number of car dealers in the DaimlerChrysler network and alleged that that DaimlerChrysler's reorganisation of its distribution network infringed Article 101(1) TFEU[165]. A GLO was ordered by Cresswell J because there was a single issue pervading all of the claims brought by the dealers, all of whom were represented by the same law firm[166]. The claim was settled, however, before it could proceed to trial.

6.4.3 Representative actions in the CAT

Claims may also be brought, pursuant to section 47B of the Competition Act, by specified consumer bodies on behalf of affected individuals. Which? (formerly known as the Consumers' Association) is the only consumer body to have been specified by the Secretary of State for this purpose[167]. SME organisations are not eligible for designation. There has been to date only one claim for damages under section 47B arising from the OFT's infringement decision in the

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[164] [2009] EWHC 741, para 38.

[165] See www.justice.gov.uk/guidance/courts-and-tribunals/courts/group-litigation-orders.htm.

[166] Further details of the action are available at www.concurrences.com/article.php3?id_article=36187&lang=en.

[167] See The Specified Body (Consumer Claims) Order 2005 SI 2365/2005.

Football Shirts case[168]. The claim was brought on behalf of 130 individual consumers seeking compensatory damages of such sum as the Tribunal considered appropriate. The case was settled before the CAT had given a final judgment; however in a judgment on the assessment of costs the CAT observed 'the fullness or otherwise of section 47B as a vessel for consumer class claims remains a matter of debate'[169]. Some commentators have called for section 47B to be amended so as to enable single, collective claims to be brought on behalf of all customers, whether consumers or businesses, who have suffered harm as a result of anti-competitive behaviour[170].

As noted above[171], the Government began consulting in April 2012 on measures intended to improve the private enforcement of competition law by in particular SMEs and consumers. Proposals include the introduction of a collective action in the CAT for competition law claims[172] affecting multiple SMEs (and consumers), on an 'opt-out' basis, and subject to a certification procedure and enhanced case management by the CAT. A corollary of this proposal is the possibility of aggregate damages, which would involve the CAT being enabled to give judgment in an aggregate sum, without proof by individual class members of their loss, if the defendant's aggregate liability to all or some of the members of the class can reasonably be determined. It is suggested that unclaimed damages would be paid to the Access to Justice Foundation, a charity which facilitates access to pro-bono legal assistance.

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[168] OFT Decision of 1 August 2003, substantially upheld on appeal Case Nos 1021/1/1/03-1022/1/1/*03 JJB Sports Plc v Office of Fair Trading* [2004] CAT 17, upheld on appeal [2006] EWCA Civ 1318, permission to appeal to the House of Lords refused on 5 February 2007.

[169] Case No 1078/7/9/07 *The Consumers Association v JJB Sports plc* [2009] CAT 2, para 8.

[170] See Wells 'Collective Actions in the United Kingdom' [2008] Competition Law Journal 57.

[171] See section 6.3, above.

[172] It is proposed that SMEs should be able to bring collective actions in both 'follow-on' actions, which follow on from that pre-existing infringement finding and 'standalone' claims, where there is no pre-existing infringement finding by a competition authority.

6.6 Desirability of improving collective redress mechanisms for SMEs

In April 2012 the Government proposed to enable collective actions for damages to be brought on behalf of businesses as well as consumers. Three particular points should be noted at this stage. First, the Government hopes that this reform will increase the deterrent effect of competition law and, possibly, the detection of transgressions in the UK. This is, presumably, based on the expectation that the reform will increase the rate and level of private enforcement. Secondly, the Government favours an "opt-out" model of collective redress in the CAT, that is to say, damages claims could be initially brought on behalf of unidentified claimants subject to a certification procedure and, of course, the possibility that individual claimants could opt-out by indicating their wish to take no part in the proceedings. It is interesting to note that this proposal accords with an earlier recommendation by the Civil Justice Council that collective actions could beneficially be introduced into the CAT in order to facilitate effective access to civil justice in civil claims[173]. Thirdly, the Government currently considers that the risk of businesses using representative actions to share information may be addressed by appropriate case management and case certification by the courts. At the time of writing the CLA members were considering the proposals.

7. SUBSTANTIVE RULES PROTECTING SMES

7.1 Rules protecting SMEs as competitors or as trading partners

Recital 8 of Regulation 1/2003[174] mentions provisions of national law which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. It is understood that other Member States of the EU have provisions concerning the abuse of economic dependence or superior bargaining power[175]. The aim of such rules is, essentially, to control

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[173] www.judiciary.gov.uk/about-the-judiciary/advisory-bodies/cjc.

[174] OJ 2003 L1/1.

[175] Staff Working Paper accompanying the Report on the functioning of Regulation 1/2003, SEC(2009) 574 final, paras 162-169 (describing the domestic provisions on economic dependence in France, Germany, Italy, Portugal, Spain, Greece, Latvia, and Hungary).

disparities of bargaining power in the supply chain. There do not appear to be any rules in English law which seek to specifically protect SMEs[176], either as competitors or as trading partners, from abuse a of superior bargaining position[177]. Certain sectors in the UK, however, have been subject to intense political and industry pressure for the competition authorities or the Government to provide redress for smaller operators[178]. Three examples illustrate the clamour for greater intervention in domestic markets involving SMEs: the grocery retailer sector, the energy markets, and the supply of beer.

7.1.1 Groceries

The UK grocery retailer sector was the subject of a wide-ranging market investigation by the CC[179], lasting almost two years, in which grocery retailers, SMEs, consumer bodies and various other interest groups made a total of 700 submissions. The Association of Convenience Stores ('ACS'), a body representing the interests of 335,000 small shops, was one of the main parties to the investigation. ACS argued, in particular, that the expansion and below-cost selling of larger grocery retailers threatened the ongoing viability of convenience stores[180]. The CC rejected this argument and concluded that competition between large grocery retailers and smaller operators did not give rise to an adverse effect on competition. The CC did find, however, that the exercise of buyer power by certain grocery retailers in relation to their (typically smaller) suppliers of

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[176] Cf sections 140A-D of the Consumer Credit Act 1974, inserted by section 19 of the Consumer Credit Act 2006, enables a court to make an order if it finds that the relationship between a creditor and the debtor arising out of a consumer credit agreement is unfair because of the terms of the agreement, the way in which it has been applied by the creditor or any other thing done or not done by the creditor.

[177] *Report on Abuse of Superior Bargaining Position* (ICN, April 2008), p 5, n 7 and p 10.

[178] See, eg the Milk (Pricing) Bill which was introduced in the House of Commons in July 2007 with the intention to confer further powers on the OFT and the CC to investigate the prices of milk paid by retailers to producers. The Bill was introduced, but not enacted, following concern about the low prices that farmers were paid for producing milk that is sold in supermarkets.

[179] CC Final Report of 30 April 2008, available at www.competition-commission.org.uk.

[180] Ibid, paras 5.44 et seq.

groceries led to an adverse effect on competition. The CC therefore recommended that an ombudsman should be created to monitor and enforce a new Groceries Supply Code of Practice governing dealing between retailers and their suppliers[181].

7.1.2 Energy Supply Probe

Following public disquiet about the level of energy prices in early 2008 the Office of Gas and Electricity Markets Authority ('OFGEM') carried out an investigation into the markets for the supply of gas and electricity for households and small business customers (commonly referred to as the 'Energy Supply Probe'). OFGEM concluded that, while the energy supply markets generally worked well, some customers, including small businesses, were not yet receiving the benefits of competition[182]. OFGEM was concerned that the poor quality of information available to small businesses (and consumers) was impairing their ability to compare prices and switch suppliers. OFGEM addressed this issue, in 2009, by modifying the gas and electricity suppliers' licence conditions rather than making a market investigation reference under the Enterprise Act[183]. OFGEM considered that amending the regulatory licensing regime was a quicker and more effective way to address the problems it had identified.

7.1.3 Supply of Beer

The supply of beer in the UK has often been placed under the microscope of competition law[184]. In May 2009 the House of Commons Business, Innovation and Skills Committee raised concerns

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[181] On 25May 2011 the Government published a draft Groceries Code Adjudicator Bill.

[182] Energy Supply Probe – Initial Findings Report, October 2008, available at www.ofgem.gov.uk.

[183] OFGEM letter of 19 October 2009, available at www.ofgem.gov.uk.

[184] See eg the European Commission held that UK brewers' exclusive purchasing agreements infringed Art 101(1), but satisfied Art 101(3) in *Bass plc* OJ [1999] L 186/1, [1999] 5 CMLR 782; interestingly, it found that the exclusive agreements of a smaller brewer, Greene King, did not infringe Art 101(1) at all: see Commission Press Release IP/98/967, 6 November 1998, upheld on appeal, Case T-25/95 *Roberts v Commission* [2001] ECR II-1881, [2001] 5 CMLR 828. See also the judgment of the English High Court in *Crehan v Inntrepreneur Pub Company* [2003] EWHC 1510, finding no infringement of Art 101(1) (ultimately upheld on appeal, [2006] UKHL 38). In 1989 the predecessor to the CC identified problems of market failure in the *Supply of Beer – A report on the supply of beer for*

about the relationship between pub companies and pubs. A particular area of concern were the number and extent of beer ties, which require the public house to purchase beer and other drinks solely from one pub company, in the public house industry. The Committee called for a market investigation. In July 2009 the Campaign for Real Ale made a super-complaint to the OFT and echoed the Committee's concerns that there were serious market failures within the UK pub industry. The OFT studied the market twice[185] and on each occasion concluded that the pub sector is competitive. The OFT did not consider that beer ties contributed to higher prices or prevented pubs from offering a wide choice to consumers. On this basis, the OFT decided that there were insufficient grounds to justify further action, either in the form of an investigation under the Competition Act or a market investigation reference under the Enterprise Act. In November 2011 the Government declined to intervene in setting the terms of commercial, contractual relationships in circumstances where they had been found by the OFT to raise no competition concerns. The Government preferred instead to endorse a voluntary code of practice to govern and, hopefully, improve the relationship between pub companies and pubs[186].

7.2 Should legislation be enacted to specifically protect SMEs as competitors or trading partners?

The CLA members did not believe that there is any need to enact such legislation in the UK. Where particular instances of market failure arise, these can be adequately addressed by using one or more of the instruments of domestic competition law described in section 2.1, above.

David Bailey
31 May 2012

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retail sale in the United Kingdom (Cm 651, 1989) and recommended, *inter alia*, divestiture of over 2,000 public houses by major breweries.

[185] The OFT's first response to the CAMRA super-complaint was OFT 1337, October 2009; following an application by CAMRA to the CAT for a review of that decision, a second decision was taken, OFT 1279, October 2010.

[186] BIS Press Release, "Last orders for unfair practices that hold back pubs", 24 November 2011.