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Baroness Hayter of Kentish Town
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10 November 2014

Dear Dianne,

Consumer Rights Bill – Enhanced Consumer Measures and Private Actions in Competition Law

We had an interesting debate during the deliberations in Grand Committee on the Consumer Rights Bill on 3 November 2014. In the debate we agreed it would be useful for me to write with more detail on a number of areas.

Costs in the civil courts

On the proposal to protect the enforcer from adverse costs in the civil courts, as stated in the debate, it is a fundamental principle of civil litigation that the loser pays. This deters actions being brought that are weak or poorly prepared.

The main aim of the civil justice reforms made by provisions contained in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) are to control the costs of civil litigation and to deter unmeritorious cases being pursued. The Part 2 reforms came into force generally in April 2013. The proposed amendment would undo these reforms by allowing enforcers to pursue risk-free litigation by not being liable to pay the costs of the business, if the claim fails.

On the difference between the criminal and civil costs regimes, generally speaking, the 'loser pays' principle does not apply in criminal cases. Individuals who do not have access to legal aid may seek to recover a proportion of their legal costs from central funds under a defendant's costs order if they are acquitted, but companies and other legal persons are no longer able to recover their legal costs from central funds. A convicted defendant may, at the discretion of the court, be ordered to pay some or all of the costs of the prosecution. In civil cases, however, it is a general principle that a successful party may recover their legal costs from the losing party.

We do not accept that there is a lack of incentives for enforcers to use the new measures. Civil actions for breaches of consumer law can be cheaper and quicker than criminal prosecutions for trading standards. There is also a lower standard of proof in the civil courts, on the 'balance of probabilities' rather than 'beyond all reasonable doubt'. To encourage take up of the measures, we are exploring with the implementation group what advice and guidance enforcers will need when the measures come into force. A first draft of the guidance has already been sent to trading standards and Which? for their initial comments.

Safeguards on private enforcers

I also agreed to write regarding the safeguards in the Bill on the use of the measures by private enforcers. Currently only Which? is designated as a private enforcer, having been designated as such in 2005. However, since they were made a private enforcer they have never used their powers. There is therefore understandable concern amongst the business community about how a private enforcer will use the measures if they are given access to them.

The Primary Authority scheme addresses inconsistency of enforcement and delivers assured advice to businesses, thereby delivering better regulation. The power to extend the measures includes a safeguard that the private enforcer must act consistently with advice or guidance given by a Primary Authority to a business when seeking an enforcement order or undertaking that includes enhanced consumer measures. The safeguard relates to all Primary Authority Advice and guidance (PAA) as defined in the Primary Authority statutory guidance. PAA is usually given to the business in writing. The statutory guidance makes it clear that the primary authority needs to consider and agree with the business how PAA is to be provided and recorded.

We can provide reassurance that mechanisms will be put in place in order for private enforcers using the enhanced consumer measures to access PAA. In practice, it will be in the interests of both the business and the Primary Authority to disclose any relevant PAA to the private enforcer. Any issues around availability or interpretation of PAA would be clarified and resolved through early dialogue between the private enforcer, the business subject to the possible measures and the Primary Authority. This is the way that local authorities acting as enforcing authorities have successfully operated thus far. The extension of the use of enhanced consumer measures to private enforcers will be subject to consultation. This consultation will consider how private enforcers will access PAA, and seek views on what provisions should be put in place to facilitate this.

The Better Regulation Delivery Office (BRDO), who have responsibility for the Primary Authority scheme will work with Which? during the consultation to enable them to confidently make use of enhanced consumer measures. In addition, BRDO will be writing to Which? next week setting out some of the proposed mechanisms to enable them to access primary authority advice if the power in the Bill to extend the measures is used.

It should also be noted that the safeguards on private enforcers put them on an equal footing with public enforcers with regard to transparency and proportionality of enforcement.

Timetable for ECMs coming into force

The Government reviews all legislation 3 to 5 years after it comes into force. The measures will become available to public enforcers in October 2015. The Government recognises that these measures are new and accepts that they will take time to bed in.

On when the power in the Bill to extend the use of the measures might be used, the Government wants to see what impact the measures have and how much redress consumers are receiving, before a decision is taken on whether it is necessary to extend the use of the measures. However, as stated in the debate, if the Government is presented with evidence that the measures are not being used or that consumers are not receiving redress, then the use of the power in the Bill can be consulted on before the 3-5 year review date.

Private Actions in Competition Law

During the debates on amendment 63C and 74A I promised to write with further details on the use of the CMA redress power. Government policy is to encourage consumers and businesses to engage in alternative dispute resolution, one option being the CMA redress power. This proposal will only work if it is acceptable to all parties involved, which is why, as stated in the debate; Government is having detailed engagements with stakeholders.

In relation to timings, we will be working with the Implementation Group between now and the end of the year on the CMA guidance. This should then be followed with testing on the guidance in the early part of next year. All being well the SI can then be laid by the end of March.

I am sending a copy of this letter to all peers who took part in the debates on these issues, and also placing a copy in the libraries of both Houses.

A handwritten signature in black ink that reads "Lucy Neville-Rolfe". The signature is written in a cursive, flowing style.

BARONESS NEVILLE-ROLFE DBE CMG