

JOINT WORKING PARTY OF THE BARS AND
LAW SOCIETIES OF THE UNITED KINGDOM ("JWP")¹

RESPONSE TO THE COMMISSION WHITE PAPER ON DAMAGES
ACTIONS FOR BREACH OF THE EC COMPETITION RULES

JULY 2008

I INTRODUCTION

- 1 The JWP welcomes the Commission's White Paper as a significant further contribution by the Commission to the ongoing debate at EC and member state level about the development of private enforcement of competition law through the courts. The JWP wholly supports the Commission's objective of ensuring that victims of infringements of the EC competition rules, who have a right under the EC Treaty to compensation, should not be precluded from doing so by inadequate national rules.
- 2 This introductory section sets out a number of general comments by the JWP on the issues raised in the White Paper, and in particular on the Commission's opening comments on the purpose and scope of the White Paper. The sections that follow deal with the specific areas of discussion in the Paper.
- 3 There are major differences at present between Member States as regards the extent to which their legal systems provide redress for consumers who are victims of infringements of EC competition rules. It is desirable to seek to enhance the rights of redress for consumers throughout the EC, but that objective is especially important in Member States where very limited rights of redress (if any) exist at present. The JWP understands that there are likely to be significant legal and political obstacles to giving effect to the proposals in the White Paper, even in some Member States that provide a degree of redress at present and it is not clear to the JWP from the White Paper how these obstacles are to be overcome.
- 4 The United Kingdom is one of the Member States with relatively advanced procedures for enabling victims of competition law infringements to obtain redress. Indeed, many of the Commission's proposals in the White Paper appear to be based on or inspired by the position in the United Kingdom. Actions for damages are becoming an established feature of the UK competition regime, with several "follow-on" damages actions in the Competition Appeal Tribunal and others in the High Court. Precedents are being set – for example, as to the availability of exemplary damages in the recent *Devenish* case². JWP members are also aware of many more cases that settle, often before the bringing of any proceedings and without publicity, but nonetheless resulting in substantial payments.
- 5 However, one area that has not flourished in the United Kingdom – despite the introduction of a new procedure in 2003 under the Competition Act 1998 relating to

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² [2007] EWHC 2394, currently on appeal to the Court of Appeal on the question of restitutionary damages

representative actions³ – is representative or collective actions on behalf of consumers. The only example to date of an action brought under this new procedure is an action brought by the Consumers' Association on behalf of a few hundred named consumers against JJB Sports "following-on" from an OFT decision finding price-fixing in the supply of certain replica football kit. That action (which settled) clearly failed to secure compensation for the vast majority of consumers who purchased the relevant football kit at the relevant time. Moreover, the Consumers' Association have stated publicly that the costs of the action were wholly disproportionate and that they would not bring a similar "opt-in" action in future. We discuss further below lessons that may be drawn from the operation of this procedure in the United Kingdom.

Extent to which the limited number of successfully concluded private actions shows that national procedural and substantive rules are inadequate

- 6 At §1.1 of the White Paper, the Commission observes that "in practice victims of EC antitrust infringements only rarely obtain reparation of the harm suffered".
- 7 It is of course true that there are generally few examples in any Member State of court awards of damages for infringement of the competition rules. Nor does the JWP dispute that one important reason for that is that in many cases national substantive and procedural rules act as a barrier to claims that would otherwise be brought.
- 8 Nonetheless, in assessing the extent to which there are in fact serious barriers to obtaining effective redress, it is important to bear in mind that: -
 - (a) as noted already above, a large number of cases settle without being formally brought, or are resolved by arbitration or mediation. That is particularly the case in the United Kingdom, where court rules encourage settlement, and where there is a developed system of alternative dispute resolution (ADR). The JWP has in the past sought to obtain evidence from its members about the extent of such informal settlement, but it is intrinsically difficult to do so given professional obligations of confidentiality, and the fact that one feature of ADR (a feature usually welcomed by both parties) is that it takes place in private and that the agreed or awarded sums of money usually remain confidential. It is however our general impression as practitioners that many more claims or potential claims are resolved without litigation than are brought before the courts, and that many of these claims result in payment of substantial amounts of compensation; and
 - (b) an important factor affecting the number of claims in the EC is the absence of a 'litigation culture' of the kind that exists in the US. In the EC, businesses and consumers are more likely to take the view that unless there are very substantial sums involved, or (in the case of businesses) that the conduct in question restricts their future development, they will often conclude that they are better off focusing their time and effort elsewhere.

³ Under Section 47B of the Competition Act 2003.

Deterrent effect of damages actions

- 9 The Commission notes that improving compensatory justice would improve the deterrent effect of the competition rules. The Commission does not though make any proposal that damages should go beyond what is necessary to secure proper compensation. We agree with that approach. We regard punishment as being a matter for public enforcement (through fines under the EC or national competition rules and – in some Member States – criminal sanctions) rather than a matter for private enforcement, which concerns compensation for loss. If the prospect of having to pay adequate compensation acts as a further deterrent to infringing behaviour, then so much the better; but we do not see deterrence as being an objective of private enforcement in itself. Moreover, a public enforcer is able to take a co-ordinated and consistent approach to the cases chosen and to the imposition of penalties, while private enforcement will depend on whether there is a claimant with the willingness and ability to sue.
- 10 We note that the *Devenish* case supports the view that EC law does not provide for exemplary damages; indeed, in that case the Court held that the EC principle of *non bis in idem* and the allocation of responsibilities as between the Commission and national courts under Regulation 1/2003 each precluded such an award by a national court⁴.

Relationship between private and public enforcement

- 11 The Commission states at §1.2 that an important guiding principle of the Commission's policy is to preserve strong public enforcement of Articles 81 and 82 by the Commission and by NCAs; the point made is that improving the position of claimants should not prejudice the system of public enforcement.
- 12 The JWP notes that the Commission does not seek to argue that making it easier to claim damages is likely to reduce the importance of public enforcement of the competition rules, or reduce the burden on public authorities. The JWP agrees that private enforcement should not be seen as a substitute for public enforcement. Even in the United States, cartels are detected and investigated by public authorities, with private litigation following in their wake. Moreover, many types of abuses of dominant position – such as predatory and excessive pricing – will often be unpromising territory for stand-alone litigation even by well-resourced claimants given the difficulty of making even a *prima facie* case without access to the alleged abuser's internal documents and to information held only by the defendant.
- 13 Indeed, it is likely that making follow-on damages actions easier will increase the burden on public authorities: -
- (a) claimants in damages actions are likely to seek documents obtained by the public authorities in order to prove elements of their case (such as causation and effect); that creates a tension with leniency programmes and other measures to encourage co-operation with, and disclosure to, the competition authorities (such as protection of confidential information);

⁴ Although the judgment in that case is on appeal to the Court of Appeal, we understand that the appeal does not challenge the Court's ruling on exemplary damages.

- (b) the prospect of being able readily to establish a cause of action once a public decision has been taken will make it more likely that victims of such infringements will complain to the public authorities rather than start a stand-alone action; and
- (c) that prospect will encourage appeals against infringement decisions by undertakings (whether defendants or potential claimants) concerned by particular findings (such as findings on adverse effect) that may be marginal to the case on infringement but which become very important in the context of potential follow-on actions.

Injunctive relief

- 14 The White Paper does not deal with injunctive relief. However, an increased ability to obtain injunctive relief would free up public resources; most complainants' prime objective is to prevent or stop the offending conduct rather than to obtain damages. Moreover, it is obviously better to prevent anti-competitive behaviour before it does damage than it is to ensure compensation after the event.

Funding

- 15 We understand the difficulties faced by the Commission in addressing the question of how actions for damages are to be funded. Nonetheless, funding is a critical issue for consumer claims (whether or not mechanisms for representative or collective actions are introduced). In the United Kingdom, changes in the law and in professional rules have enabled various forms of funding to be introduced, including conditional fees and third-party funding. Where consumer actions have successfully been brought in other areas of the law (for example, product liability claims) the ability to obtain such funding has been critical. Whatever reforms are introduced, we fear that they will fall on stony ground in Member States that have not addressed funding issues.

II STANDING AND COLLECTIVE REDRESS (§2.1 OF THE WHITE PAPER)

- 16 We agree that the question of standing of indirect purchasers seems to have been resolved by the Court of Justice.
- 17 The JWP agrees that there is a good case for conferring on consumers' associations a role in taking private action on behalf of consumers, in which we would include a right to take action for injunctive relief.
- 18 As the Commission recognises (in its reference to its own initiative on collective redress mechanisms) there are already discussions as to the appropriate way of proceeding in relation to representative actions more generally. It seems to us that the question of representative actions in relation to competition law claims by consumers is best considered in the context of that more general discussion of collective redress. It would be highly undesirable for competition claims to be governed by different rules from those applicable in the consumer law field. We are therefore of the view that the question of representative actions should be considered in that wider context rather than just in relation to competition law claims.

- 19 The Commission's reference to "identifiable victims" seems to suggest that ("in rather restricted cases") representative bodies will be permitted to act on behalf of a class of victims whether those victims have chosen to be represented or not. This would appear to be a form of "opt-out" action (about which JWP members have different views in principle)⁵. It is also unclear to us what the Commission means by "restricted cases". One relatively uncontroversial area in which a representative body might be permitted to commence an action on behalf of identifiable but not identified victims might be where it is likely that, once the litigation is underway, victims are likely to be identified and to consent to join the action: in an age of internet sales, customer loyalty schemes and widespread credit/debit card purchases there are now a number of ways of obtaining information about the identity of purchasers of even quite small-value goods and services, and the court should be able, if necessary, to require (subject to proportionality and data protection issues) the defendant or third parties to provide representative bodies with customer names and addresses for the purpose of contacting them to see if they wish to join the claim.
- 20 As to the determination of who is to be a qualified entity, we think that the right approach is to allow for a large element of judicial control on who may act, in any particular case, as a representative body (although we would accept "official designation in advance" in relation to established consumer representative organisations).
- 21 The Commission refers to the possibility of "state bodies" taking on such a role. Of course, there are a large number of state or other public bodies that could in principle take on such a role, in particular bodies charged with promoting the interests of consumers. We would though be cautious about NCAs, or bodies closely associated with NCAs, taking on such a role, not least because of the risk of conflict between the interests of the consumers or businesses to be represented in such actions and the public interest more generally: difficult questions would also arise as to the use by NCAs of material obtained by them in their capacity as enforcers of the competition rules rather than as representatives of victims.

⁵ Actions brought on behalf of an unascertained class of consumers raise a number of difficulties, such as: -

- dealing with the relationship between the class claim and any actual claims by particular individuals within the class;
- dealing with claims by different bodies to act on behalf of the same class;
- supervision of those acting on behalf of the class (for example, in approving any settlement reached, or decision not to settle);
- difficulties under Article 6 of the ECHR in relation to "opt-outs"; and
- distribution of damages to unascertained claimants.

Further, the costs of determining a follow-on claim on a class basis will have to be borne by the defendants, deducted from the amount actually paid to consumers, or (in the case of court time) borne by the public purse or by other litigants. There are differences of view within the JWP as to whether it is right to go down this route in relation to cases where the damage to individual victims is so small or so uncertain that they cannot be persuaded to come forward and/or to take the costless step of consenting to be named parties. Many within the JWP consider that the appropriate way of dealing with such cases is by way of public enforcement, where the penalty could in principle be set to take account of the unlikelihood of any significant private actions (and/or where wrongdoers can be encouraged to take suitable steps to compensate their customers, as in the UK Independent Schools case). On the other hand, there is plainly an argument that it is in principle undesirable that infringers who may have inflicted significant harm on the economy as a whole should not be required to compensate their victims simply because each individual has suffered only a small amount of damage.

22 We have some reservations about whether representative actions are appropriate for business claims. As compared to consumer claims, business claims are more likely to be complex and to differ among each other in crucial respects (e.g. possible application of the passing-on defence; claims as a competitor as well as a customer, tax issues) and businesses are more likely to have particular commercial and legal interests on which they should take individual advice. Moreover, any representative body acting for competing businesses will need to set up mechanisms for avoiding anti-competitive discussions, and exchanges of information, between the businesses concerned. However, we recognise that differentiating between consumer and business claims creates some anomalies (for example, in relation to self-employed individuals), and also accept that the case for representative actions for consumers applies with equal force to (at least) small businesses. We think that the right approach here will not be to designate representative bodies for business claimants in advance, but to allow courts to grant ad hoc authorisation to trade associations or ad hoc bodies in relation to particular claims and particular businesses or classes of businesses; the court would need in such cases to ensure that mechanisms were in place to avoid the difficulties we have referred to.

III ACCESS TO EVIDENCE (§2.2)

23 We observe that the proposed minimum standards of disclosure are already met in relation to the rules as to disclosure⁶ in all three UK legal systems.

24 We consider that the proposed minimum standards should apply in all actions based on the EC competition rules (including injunctive proceedings and stand-alone actions).

25 We feel it is right to note that the practical operation of the UK rules as to disclosure (or recovery and inspection) relies heavily on the fact that all members of the UK legal professions owe duties to the Court in relation to disclosure and that their respective professional rules all reflect and indeed emphasise that duty. This enables disclosure to take place effectively and with a minimum need for judicial supervision. In Member States where there is no equivalent to the UK rules on disclosure, it will be necessary to consider carefully to what extent legal professional rules need to be altered in order to reflect the disclosure rules proposed by the Commission. It may also be noted that the creation of so-called "confidentiality rings" – frequently a necessary part of a disclosure exercise in the English Courts when highly sensitive material is at issue – requires an appropriate framework of professional rules; because (in the United Kingdom) in-house legal advisers are members of one of the UK legal professions and subject to its professional rules, it is often possible to include internal advisers in confidentiality rings.

26 We are concerned by the Commission's proposal that "adequate protection should be given to corporate statements by leniency applicants and to the investigations of competition authorities". This appears to suggest that it is envisaged that, as a matter of EC law, national rules should be required to protect such material. We have the following observations: -

- (a) First, there is an important distinction between protection for corporate leniency statements and protection for pre-existing material annexed to such statements. We understand that, in cases in which it has been involved, the Commission has acknowledged this distinction and does not seek special treatment for the latter. We would endorse that approach.

⁶ Recovery and inspection in Scotland

- (b) Secondly, it is important to draw a distinction between disclosure of material held by the competition authorities while an investigation is ongoing (where there is a need to consider prejudice to an ongoing investigation) and disclosure after the decision. Follow-on actions will usually involve post-decision disclosure, where the reasons for non-disclosure are usually less pressing.
- (c) Thirdly, to what extent should claimants have access to the file? If they do not have such access then there is a risk of serious inequality of arms between them and the defendants (who will have had such access during the administrative proceedings, and will be aware of the material and able to take points based on that material, even if they are restricted in their ability to use it in subsequent civil proceedings).
- (d) Fourthly, where there is a right of full appeal to a court, and where that right has been exercised, a large amount of material from the file (including, quite possibly, leniency material) is likely to be in the public domain⁷. Claimants should be allowed to use such material. Further, once it is accepted that on appeal material held by the competition authority is likely to become publicly available, it is difficult to see why such material should not be available to claimants even where there has not been an appeal.

27 We consider that the balance between, on the one hand, the protection of leniency applicants and the competition authorities' investigations and, on the other hand, the public interest in ensuring that the court and the parties in follow-on actions have access to relevant material, is one that should be left to the courts to determine, as has been the case in the United Kingdom.

IV BINDING EFFECTS OF NCA DECISIONS (§2.3)

28 In principle, we accept that where an NCA has found an infringement, that finding should bind the courts of other Member States.

29 The White Paper is not clear as to whether all findings of fact made by an NCA would be binding (as opposed to the fact of the infringement)⁸. In follow-on actions, statements in a decision as to the effect of conduct on competition are of course of some importance, although they may not form part of the actual infringement decision. We consider that all such findings of fact should be binding (which is the position in the United Kingdom in relation to findings by the Commission and the UK NCAs).

⁷ For an example in the UK Competition Appeal Tribunal, see *Umbro v. OFT* [2003] CAT 26 (a case concerning disclosure of a failed application for leniency by one party in the context of an appeal by a number of parties), where the Tribunal observed (at §§32-33) that: "[the CAT's] proceedings should be conducted on a basis that is as fully open as possible, subject only to the protection of vital business secrets or for some other overriding reason. It must be remembered that the Tribunal's judgment is a public document that has to be published. The Tribunal's hearings are in public, the transcripts of its hearings are published and so on. Equally, in a case such as the present, which takes place in a setting in which parties have had penalties imposed upon them, it is, in the Tribunal's judgment, of overriding importance that the parties should be able to exercise their rights of defence without having possibly relevant material held back or inaccessible. In the event of a conflict between the rights of the defence and other claims to confidentiality there must, in our judgment, be a presumption that the rights of defence prevail."

⁸ See s.58 of the UK Competition Act 1998, provides that the OFT's findings of fact in the course of an investigation are binding. S.58A provides that decisions of the OFT or the Commission that there is an infringement are also binding.

- 30 The Commission notes that the rule must be without prejudice to the power (or duty) of national courts to refer questions of EC law to the Court of Justice under Article 234 EC. We note however that the Court of Justice could assist only where a national court considers that the NCA of the other Member State may have misunderstood the law: errors of fact or of economic appraisal could not be dealt with in that way.
- 31 If foreign NCAs' decisions are in principle to be made binding, we consider that that should happen only if the decision was binding in the law of the relevant Member State; it would be difficult to defend a situation where an NCA whose decisions were (for whatever reason) thought by the Member State concerned not to be binding in its own courts were binding in the courts of other Member States.
- 32 Their binding nature should also depend on whether the defendant had any effective right to challenge, before a judicial body, the decision in respect of the findings being relied on. Given that most administrative procedures before NCAs do not in themselves meet the "fair trial" requirements in Article 6 of the ECHR, we think there is a strong case for saying that in order for a right of challenge to be regarded as "effective" for these purposes it should be a right to challenge the decision on the merits, or (at least) a right to a thorough judicial scrutiny of the factual basis of the decision and of the fairness of the procedures adopted, such as is provided by the CFI in relation to decisions of the Commission.
- 33 We also note that numerous practical difficulties arise. For example, most NCA decisions will naturally concentrate on the aspects of the infringement that relate to their own Member State, and it may often be unclear to what extent the NCA was making findings in relation to the position in other Member States. National courts will also have to grapple with decisions written in a foreign language and against the background of a different legal system and culture. It may be in some cases that national courts wish to put questions to the foreign NCA in order to clarify the meaning of the decision.

V FAULT REQUIREMENT (§2.4)

- 34 Since the United Kingdom does not require proof of fault, this part of the White Paper will not affect the United Kingdom. Indeed, we suspect that a fault test (whether the burden is on the claimant or the defendant) is unlikely to be consistent with the right to damages set out in the Crehan and Manfredi judgments.
- 35 But if Member States wish to retain a fault test (and are to be entitled to do so), we would propose use of the "intention or negligence" test in what is now Article 23(2)(a) of Regulation 1/2003. That test has the advantage of familiarity to practitioners and a large volume of case-law and academic consideration.

VI DAMAGES (§2.5)

- 36 We agree with the Commission's proposals in principle. It should of course be borne in mind that damages cases greatly vary depending on the facts; thus, a claim for loss of profit by a competitor excluded from the market as a result of exclusionary agreements or conduct raises different issues from a claim by a purchaser from a cartel. We wonder whether it is possible to produce guidance that is not either too general to be useful or too fact-dependant to be of assistance in cases where the facts are not the same.

37 It should also be borne in mind that in practice one of the key difficulties confronting the claimant is establishing what the counterfactual would have been in the absence of the infringement; thus, the defendant will often argue (for example) that even absent an unlawful tie agreement, purchasers would still not have bought from the claimant. In such cases, the difficulty is not one of quantification but of causation.

VII PASSING ON (§2.6)

38 We have some difficulties with the Commission's proposal of a rebuttable presumption in favour of indirect purchasers to the effect that the illegal overcharge was passed on in full.

39 First, although it may well be justified to provide for rebuttable presumptions in cases where the defendant is more likely to be able to prove the negative than the claimant to prove the positive, that is not true here; the relevant material will typically be in the possession of the intermediate purchaser or the claimant itself, and the defendant will often not be in any position to rebut the presumption.

40 Secondly, as the Commission recognises at the end of this section, the existence of such a rebuttable presumption increases the chance of inconsistent findings and double recovery. It is easy to see cases in which an indirect purchaser recovers on the basis of the rebuttable presumption, but where the direct purchaser in later proceedings shows that in fact the overcharge was not passed on. We are not confident that national courts will be in a position to prevent that happening, especially as the different actions might well be brought in different jurisdictions and/or at different times.

VII LIMITATION (§2.7)

41 The Commission's proposals here effectively reflect the existing position in the United Kingdom. We note that issues have arisen in the United Kingdom as to: cases where some defendants have appealed and others have not (so that the decision becomes final against the non-appellants before becoming final against the appellants); and cases where the appeal is on fine/penalty only⁹. We also note that the sometimes lengthy administrative process combined with lengthy appeals before the Community Courts can mean that actions are brought only many years after the original infringement, which is plainly unsatisfactory. If there is any concern as to whether relevant documents are being retained it may be necessary to allow follow-on actions to be brought while appeals are still pending, in order that appropriate orders can be made for the preservation of such documents (see the second Morgan Crucible CAT judgment at [2007] CAT 30). However, the most obvious answer to the issue of delayed follow on actions is to speed up the administrative and appellate proceedings, which leads to issues outside the scope of this paper.

VIII COSTS (§2.8)

42 Given the very different approaches of the Member States to costs issues, we think the White Paper is right to adopt a cautious approach. In any event, we have considerable reservations as to whether it is right to seek to deal with costs of competition cases in isolation from issues of costs more generally (particularly in relation to similar types of action such as consumer law or product liability claims). It is also important to retain

⁹ See Morgan Crucible [2007] CAT 28 and [2007] CAT 30

costs rules that discourage frivolous litigation, particularly given the serious economic damage that can be caused by such litigation (or the fear of such litigation) in the competition sphere.

- 43 In general, UK costs rules (in the High Court/Court of Session and in the CAT) encourage settlement; nor are court fees set at unacceptable levels (proceedings in the CAT are free). The possibility of cost-capping orders has been mooted in appeal proceedings before the CAT, and it may well be that the CAT will (under its flexible rules) make such orders in appropriate cases.

IX RELATIONSHIP WITH LENIENCY PROGRAMMES (§2.9)

- 44 We agree with the principle that corporate leniency statements should be protected until a decision is taken. However, once a decision is taken (so that the fact of leniency and the extent of the infringing conduct becomes matters of public record) we consider that the balance between the public interest in protection of the leniency applicant and the public interest in the claimant and the court having access to relevant documentation may well swing in favour of disclosure. We refer to the points we made in §26 above.

- 45 We are attracted in principle by the proposal to limit the liability of successful leniency applicants for contributions from other infringers. However, we are not convinced that in practice this reform would add much at this stage (i.e. when rights of redress for consumers are much less well developed in the EU than they are in the US) to the incentives to seek leniency that already exist.

X OTHER ISSUES NOT COVERED IN THE WHITE PAPER

- 46 We think that the Commission and NCAs should consider encouraging undertakings to give redress to their customers as part of their enforcement procedures. Suitable cases for such action are where damage to individual purchasers is too small or too uncertain to make litigation feasible; we do not however think that the competition authorities should be offering any discount from penalty in return for redress in cases where private follow-on actions appear a real possibility (and in any event defendants will be reluctant to give redress if they still face a real risk of private action).

- 47 If the competition authorities are to encourage undertakings to give redress in return for some discount on penalty, they will need to set out a policy as to the circumstances in which they will take account of such an offer. They will also need to consider the appropriate procedures for making and considering an offer of redress in the context of the assessment of penalty.

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