1. INTRODUCTION

1.1 Maclay Murray & Spens LLP (MMS) welcomes the opportunity to comment on the Commission's White Paper on Damages actions for breach of the EC antitrust rules. Our comments are based on our experience of acting both for companies involved in cartel investigations and for parties seeking redress for breaches of competition law, under the EC Treaty and national competition rules. Our experience in relation to damages actions relates substantially to those raised in the UK, in particular in the Competition Appeal Tribunal (CAT).

1.2 We welcome the Commission's attempt to balance interests of an efficient, effective and accessible system of private enforcement with the need to discourage vexatious litigation. Improving the system for private enforcement whilst ensuring that this does not upset the balance of civil procedure across vastly differing Member States' systems presents huge challenges. We comment below on a selection of issues arising from the White Paper.

2. GENERAL

2.1 In our view, increased use of private enforcement of competition law should aim to provide appropriate redress to those who can be shown to have suffered loss. A secondary issue is strengthening future compliance and deterrence. The system should maintain balance between the rights of the claimant and those of the allegedly infringing party. We would not support the creation of a "culture of litigation" but rather a "culture of compliance" with complementary public and private arms. Currently, victims of anti-competitive conduct have little prospect of redress. This is regrettable.

2.2 We see some real difficulties in applying differing rules to competition claims than those applicable to other types of claim. In a specialist tribunal, such as the CAT, this is easier to achieve, since the jurisdiction is ringfenced (although there could be disputes about this in future, presumably) and any particular approach adopted need not necessarily spill over into other types of cases. However, in the normal courts (whether follow-on or stand-alone) it is possible that claims could be devised as "competition claims" to benefit from more advantageous procedural or evidence

rules. It is likely in practice to be difficult to draw the line between a claim which qualifies as a competition claim and one which does not. The Commission in its proposal does not distinguish between specialist and non-specialist tribunals. We would suggest it should be sufficient for the UK to introduce proposed procedural changes in the CAT.

2.3 The issues and difficulties in facilitating follow-on actions are in fundamental respects different from those in relation to stand-alone actions. In addition, the risks of upsetting the balance of justice and ending up with a litigation culture are perhaps greater where stand-alone actions are concerned. Follow-on actions are naturally limited by the output of the Commission and NCAs, so the opportunities for a litigation culture emerging are restricted. We therefore consider these two types of claim separately below.

3. FOLLOW-ON ACTIONS

3.1 Claimants in follow-on actions have the considerable benefit of an existing decision by the Commission or a national competition authority (NCA) to support their claim, but nevertheless continue to face substantive issues of causation and loss as well as procedural difficulties. In particular, claimants often lack information about prices charged for the relevant products during the period of a cartel. The defendants, on the other hand, will have been involved in the cartel proceedings for some years so will have been aware of the issue. The Commission or an NCA may even hold this information as a result of the investigation. If the Commission's policy intention is to encourage further actions, then there is more it could do before looking at controversial procedural change. For example:

- the Commission and NCAs could include in their infringement decisions prices of the cartelised products for the period of the cartel and the identities of customers affected. They could require all cartelists to supply this information, or require it as a condition of leniency, e.g. as in the Commission's Lysine decision;
- the cartelists could be prohibited, as soon as the Commission/NCA commences an investigation, from destroying relevant sales records; and

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- The Commission could be more robust with cartelists on confidential information included in the decision. Many cartelists successfully claim information is confidential, but given the time that is likely to have elapsed between the end of a cartel and the commencement of a claim, this may not be an issue.

3.2 At the same time, we would like to see the Commission/NCA more sensitive to due process and the rights of the defence when making its decisions. With an infringement decisions holding such weight in national courts, the Commission has a responsibility to ensure its decision is robust, its processes fair and that it has sufficient (and coordinated) evidence against each and every cartelist when acting for companies allegedly involved in cartel. We are often disappointed by the way in which the Commission places reliance on one evidence source. Indeed, we note the numerous procedural challenges pending at the CFI/ECJ and the fact that even these are unlikely to include all defendants who felt aggrieved by their treatment. This issue becomes all the more relevant given the proposal to give NCA decisions binding effect in other Member States. While this is superficially attractive, it also assumes that the quality of decision-making by NCAs in the EU will be consistent and procedurally robust. It may be that a compromise solution would be to introduce a rebuttable presumption in favour of another NCA's decision.

3.3 On the whole, our view is that in the UK, the CAT is an effective forum in which to bring an action. Although the rules require a claim to be quantified, the CAT appears to adopt a fairly pragmatic view to admissibility of claims, recognising the difficulties faced by claimants in terms of quantification. A specialist tribunal is more likely to recognise these sorts of issues and to be in a position to accommodate them.

4. STAND ALONE ACTIONS

4.1 The issue raised in 2.2 above about different treatment of competition cases as compared with others applies all the more to stand-alone actions, as these are more likely to originate in the normal courts. For instance, where a competition claim is raised in the normal courts as only part of a case or as a defence or counterclaim to an action, how could different rules for opting in or on costs and funding be applied to the competition part of the claim?

4.2 It is noteworthy that the output of decisions of the OFT on which follow-on actions can be based has been very low of late. On the face of it, this might suggest that steps should be taken to facilitate stand-alone actions. On the other hand, in any civil proceedings there is inevitably (and quite appropriately) a materiality threshold: a person who trips on an uneven paving stone will only sue the local authority if he is badly hurt, and we see no reason why the same should not apply in competition cases.