

UK COMPETITION LAW ASSOCIATION

Consultation Response

European Commission White Paper on damages actions for breach of the EC anti trust rules (the "White Paper")

August 2008

1. INTRODUCTION

1.1 This document sets out the response prepared on behalf of the UK Competition Law Association to the White Paper

2. GENERAL POINTS

2.1 As an introductory point, it is important for the Commission to note that many of the key reforms proposed by the Commission are already present in one form or another in the English legal system. In particular:

- representative consumer bodies have the power to bring "class actions" (albeit on an "opt-in" basis and only following an infringement decision) for competition law infringements;
- defendants are required to give wide ranging disclosure of all relevant documents;
- claimants have the right to bring private actions before the courts seeking to establish liability and entitlement to damages on a "no-fault" basis;
- in the context of a follow-on action, a new limitation period of two years begins to run from the date when an infringement decision from which the claimant relies becomes final.

2.2 Despite these measures, there remain very few examples of "stand alone" private actions brought before the English courts which seek to establish both an infringement of competition law and claim damages as a result. The members of the CLA are not aware of a single occasion where damages have been awarded in such circumstances:¹

- *Arkin v Borchard Lines Limited & Others* [2002] UK CLR 150: the trial in this case lasted for 49 days and the claimant lost;
- *Inntrepreneur Pub Co. & Others (CPC) v Crehan* [2006] UKHL 38, [2007] 1 AC 333: 30 days trial (including evidence from 8 experts); the claimant lost (the judgment was reversed on appeal by the Court of Appeal but restored on further appeal to the House of Lords);
- *Chester City Council & Anor v Arriva plc and ors* [2007] EWHC 1373 (Ch): the trial lasted for 12 days and the claimant lost;
- *Attheraces Ltd v the British Horseracing Board* [2007] EWCA Civ 38, [2007] UKCLR 309: the claimant succeeded at trial lasting some 17 days but the judgment was reversed on appeal.

¹ Some of the claims by the English, Scottish and Northern Irish health authorities against generic drugs manufacturers for damages arising out of an alleged cartel have produced substantial damages settlements, but they are not typical "stand alone" actions since there a whistleblower provided the National Health Service with substantial information and there are parallel criminal proceedings against many of the defendants

- 2.3 At the time of writing, a further case is awaiting judgment on the counterclaim that alleges unlawful collusion: *Bookmakers' Afternoon Greyhound Racing Services Ltd & Ors v Amalgamated Racing Ltd & Ors*: 29 days trial (the claimants lost on their claim of price-fixing).
- 2.4 The extraordinary costs of these cases hardly needs emphasising. In part they are a product of the reliance in England on oral court argument; but they also result from the necessity for expert evidence, and the discovery process which is very time-consuming and in such cases typically involves masses of documents. Accordingly, the introduction of discovery in civil law systems as the Commission proposes, although necessary (see below), will significantly increase the costs in those Member States that presently do not have discovery in litigation.
- 2.5 In contrast, there have been a number of "follow-on" actions which have, by all accounts, achieved successful settlements. These include:
- *Provimi Limited v Aventis Animal Nutrition SA & Others* [2003] EWHC 962 (a claim for damages before the English High Court following on from the EC's infringement decision in connection with the Vitamins cartel);
 - *Healthcare at Home v Genzyme Limited* [2006] CAT 30 (a damages action before the UK Competition Appeal Tribunal ("CAT") following on from the CAT's judgment upholding the infringement decision by the Office of Fair Trading that Genzyme had abused its dominant position);
 - At the time of writing a number of other follow on actions are currently before the CAT; for example, see the reported preliminary issue judgment in *Emerson Electric Co. and others v Morgan Crucible Plc* [2007] CAT 28, 17 October 2007.
- 2.6 The English experience summarised above strongly indicates that the prospects for wider resort to "stand-alone" damages claims are very limited, and the reforms suggested in the White Paper will not, in the CLA's view, change that situation in any fundamental respect.
- 2.7 The real potential for damage recovery through private actions is therefore through follow-on claims. This is necessarily dependant in the first instance on the NCA or the Commission taking an infringement decision.² If no such decision is taken, it is likely that in the great majority of cases the persons injured by the anti-competitive agreement or conduct will not make a damages claim.
- 2.8 However, even in follow-on actions, complex issues of act and law have arisen in connection with:
- the extent to which the claimant can rely upon the "footprint" of the original infringement decision to claim damages for previous/subsequent time periods and/or related products (*Genzyme*);
 - the availability of damages on either an exemplary and/or restitutionary basis in connection with losses which may be difficult to quantify or show causation on ordinary principles (*Devenish Nutrition v Sanofi Aventis* [2008] E.C.C 4);
 - the existence of pending appeals in other jurisdictions and/or being brought by other defendants in circumstances where a claimant has brought a damages action against a party who has chosen not to appeal an infringement decision relating to essentially the same subject matter (*Morgan Crucible*): see paras 9.3.-9.7, below.

² In this regard, it is notable that the UK OFT has not produced an infringement decision within the last 18 months.

2.9 Accordingly, if the Commission wishes to facilitate the role of private enforcement, it is suggested that regard should be given to the following general principles:

- even following the introduction of measures such as those contemplated in the White Paper, the disincentives to bring such actions (particularly where the claimant needs to establish liability) will remain considerable;
- if the Commission wishes to see vigorous private enforcement, it is likely to be necessary to err on the side of implementing measures specifically to assist claimants;
- it should be accepted that private enforcement action will never act as a substitute for strong and vigorous public enforcement by national and regional competition authorities;
- a particular "enforcement gap" has arisen in the UK. This relates to the large body of cases which are not considered a high enough priority in public enforcement terms to be investigated by the national regulator and, conversely, where the complainant is not sufficiently well resourced to undertake the task and bear the costs risk of bringing the action privately.

3. STANDING

3.1 Representative actions:

3.2 In the UK, representative actions may presently be brought only by the appointed consumer body Which? and are confined to follow-on actions in reliance upon a previous infringement decision.

3.3 The only action brought to date was in connection with losses suffered by purchasers of football shirts following the OFT's infringement decision in Price Fixing of Replica Kit [1 August 2003] CA 98/06/2003. These proceedings were not regarded as a success in practical terms given that, despite establishing liability on the part of the defendants to pay damages, the quantum of damage established for the purposes of the fund did not exceed some £20,000 (which reflected the administrative difficulty and costs of generating large numbers of individual claims of only £5 to £10 some six years after the event, given that recovery was confined to a limited class of identified purchasers of football shirts and to the "overcharge" suffered by each purchaser). Representatives of Which? have publicly stated that it would not be viable for such an action to be brought in the future.

3.4 Accordingly, the CLA believes that if the Commission wishes to encourage viable representative actions, these will need to proceed on an "opt-out" basis.

3.5 Moreover, it would seem sensible to permit suitable qualified representative bodies to be appointed to bring such actions on an ad-hoc basis, subject to appropriate measures to control the suitability and scope of any such appointment.

3.6 In particular, the CLA would support the identification and appointment of representative bodies to represent and bring actions on behalf of small businesses, with regard to the "enforcement gap" noted above.

3.7 Finally, the CLA supports the introduction of measures to secure the effective distribution of funds on behalf of unidentified complainants, including those operating on the cy-près model. Reference is made to procedures established by the US courts, such as that applied in the Fuel Surcharges Cartel Investigation to distribute the funds from the settlement achieved in that case: www.airpassengerrefund.co.uk. It goes without saying that such settlements should be approved by the national court and subject to the controls and supervision that will apply from such a condition.

- 3.8 Opt-in collective actions:
- 3.9 The only form of collective action currently permitted under English law is a Group Litigation Order, which permits the courts to combine separate claims which have already been lodged on an individual basis by named claimants. However, these measures are used infrequently and require that each party is seeking a sufficiently material sum to warrant lodging the claim on an individual basis in the first instance.
- 3.10 The Commission should be aware that any measure whereby victims are required to expressly decide to combine their individual claims on an "opt-in" basis is likely to be of extremely limited application. In practice, it is anticipated that such claims would be confined to cases where the individual claimants had each suffered significant losses as would warrant them taking pro-active steps to initiate litigation. This is likely to exclude the vast majority of consumer claims (as demonstrated by the consumer inertia in the Which?/Football Kits example noted above). Difficulties are compounded by the costs risks that such consumers will feel exposed to together with a natural reluctance on the part of ordinary private individuals to engage in litigation.
- 3.11 As such, the CLA is of the view that further consideration should be given to the introduction of "opt-out" claims if the Commission's primary objective is to achieve pro-active enforcement of competition law on behalf of, in particular, small and medium-sized enterprises or classes of consumers who would not necessarily qualify for the benefits of a representative action.
- 3.12 In the first instance, the availability of opt-out claims should be limited to "follow on" actions where liability has already been established against the defendants concerned. This will limit the potential for vexatious and otherwise unmeritorious claims, thus securing the benefit of increased access to redress on behalf of claimants whilst avoiding the negative aspects of such actions which are perceived to exist in some jurisdictions.
- 3.13 In particular, any introduction of opt-out claims would have to be subject to suitable controls to ensure that the benefits of the US system were preserved but the dangers avoided. These would include:
- (a) appropriate controls should be available upon the scope of disclosure;
 - (b) strict rules should be applied to ensure that the subject matter and conduct of a class action is appropriate for enforcement by the national courts at the outset of the action and throughout the life of the claim on a case by case basis;
 - (c) the 'loser pays costs' principle should be applied (subject to the court's discretion as noted below) to discipline unmeritorious claims; and
 - (d) damages awards should be made on a compensatory basis and not a punitive basis.

4. DISCLOSURE

- 4.1 Broadly, the CLA agrees with the Commission's proposals.
- 4.2 The issue of appropriate disclosure is one of the central issues for a claimant at the outset of proceedings.
- 4.3 The CLA would query whether the envisaged restriction (that disclosure be subject to "specific conditions" and confined to "precise categories of evidence") is not too restrictive given, in particular, the fact that many Member States currently have relatively restrictive disclosure regimes. It is of course the case that it is necessary for a case to be appropriately pleaded and for the parties to disclose documents which are relevant to the issues that arise. However, requiring the claimant at the outset of the proceedings to

identify and anticipate the precise categories of evidence where relevant material may be found arguably places an undue burden on the claimant given that, at that same stage, the nature and format of the evidence concerned is within the defendant's knowledge.

- 4.4 As such, the CLA would recommend that disclosure principles be adopted which broadly reflect the principles used by the English courts. These should, in particular, include the opportunity for pre-action disclosure available in this jurisdiction together with the establishment of appropriate guidelines to indicate the circumstances when it should apply (for example, see the discussion of the High Court in the unsuccessful application for pre-action disclosure in *Hutchison 3G v O2 & Others* [2008] EWHC 50).

5. BINDING EFFECT OF NCA DECISIONS

- 5.1 The CLA anticipates difficulties arising from the Commission's proposals that the final decision on Article 81 or 82 (or resulting judgment on appeal by any national review court) should be accepted in every Member State as irrebuttable proof of infringement. This concern arises even if the binding effect is limited to the same parties and the same undertakings to which a review court found an infringement.

- 5.2 First, whilst the Commission is correct to state that the decisions of NCA's are subject to judicial review, many are not subject to a full merits appeal. Prima facie breaches of Article 6 ECHR continue to arise in some Member States where infringement decisions are reached in circumstances where the party has not had the opportunity of a hearing before an independent tribunal at the initial decision stage and where its ability to appeal the decision to an independent tribunal has been confined to a form of judicial review (which is generally limited to a form of "manifest error" test, depending upon the Member State concerned).

- 5.3 These procedural issues are particularly present in some Member States where judicial review is undertaken by a non-specialist court and, unlike the CFI, does not undertake a de facto review of the facts in connection with key issues such as the scope and size of fines.

- 5.4 Other examples include Member States where, at present, neither the national courts nor the anti-trust authorities recognise the protection afforded by legal privilege as that term is understood either under Community or English law.

- 5.5 Until greater uniformity of procedural safeguards has been achieved within the Community, the export of NCA decisions throughout the Community is premature and undesirable, irrespective of the preservation of the limited safeguard to reopen the facts before the courts of a second Member State in circumstances where a procedural failing has been observed in the Member State where the original infringement decision was produced (see further below).

- 5.6 Secondly, the proposal presents problems on a practical basis. Parties in one Member State may face a damages action where some of their co-defendants must be presumed by the national court concerned to be guilty as a result of NCA proceedings which occurred in a second Member State and with which the first defendant had no involvement. The ability of the first defendant to receive a fair trial in such circumstances is obviously prejudiced. Similar practical difficulties will arise in connection with:

- The interpretation by the national court of the scope of the infringement decision made by the NCA located in a different Member State (with regard to issues such as time period, geographic area and subject matter) in which the infringement is to be presumed to extend;
- Language difficulties that will arise in efforts to interpret and resolve difficulties such as those noted above where, in particular, it is necessary to refer to

underlying documents considered by the NCA to ascertain the "footprint" of the underlying decision or other issues which bind the national court but which are not clear from the face of the infringement decision.

5.7 Accordingly, the CLA suggests that at this stage in the development of the Community the pragmatic and appropriate measure is to require national courts to pay "due regard" or such similar deference to the decisions concerned but to permit the national courts sufficient discretion to make new findings of fact or law if warranted on the merits of the case concerned.

6. FAULT REQUIREMENT

6.1 The CLA agrees with the Commission's proposal to the extent that it argues competition law should be enforced on a "no fault" basis. This reflects the situation in England and Wales where infringements are actionable on a strict liability basis as a breach of statutory duty.

6.2 There appears little rationale for the incorporation of an exception on the basis of "excusable error" as a means to avoid liability in damages for a breach. Such a measure may justify a reduction or avoidance of penal sanctions through fines. However, the purpose of damages is to restore the harm done to an innocent third party from the breach. There is no reason why that innocent third party should be required to bear the loss for the breach rather than the defendant on the basis that the defendant made the error but it was excusable. Ordinary damages principles applicable by the national courts – such as reduction in the amount of damages to reflect the failure of an injured party to mitigate its loss – should be adequate to address situations where the third party bears some responsibility for the breach concerned.

7. DAMAGES

7.1 The CLA welcomes the acceptance of the compensatory principles and, furthermore, that such compensation should extend to the full amount of the loss concerned (i.e. to address loss of profits).

7.2 Care needs to be taken, if codification of the Manfredi judgment is to be undertaken, not to unintentionally exclude types of harm for which damages may be claimed. An example is the need to ensure that parties are able to claim damages on the basis of restitutionary measures and/or an account for profits in circumstances where it may be difficult to establish the quantum and causation of losses under ordinary principles.

7.3 In particular, competition law infringements often by their very nature involve species of loss that are difficult to quantify and trace. Where conduct is aimed at distorting a market or damaging a competitor, it may be the case that the entire operations of the business concerned (i.e. other than just the affected product market) are held back in some way due to the distortion of the very market itself in which the business seeks to operate. These wider losses are difficult to quantify and prove with regard to a clear counterfactual analysis, whereas the illegal profits secured by the perpetrator may be easier to trace and recover. In such cases, there are strong arguments that elements of doubt over the quantum and causation of the damage should be resolved in the favour of the claimant where it is possible to show that illegal profits have been made. In this regard, the relevance of restitutionary measures in competition law actions have been considered in the context of competition law infringements (for example, see the comments of Sir Christopher Bellamy in *Genzyme v OFT* [2005] CAT 32).

7.4 Guidance upon the appropriate method for the quantification of damages would appear to be helpful and likely to promote the early settlement of cases. However, such guidance should not seek to fetter the discretion of the national court to resolve issues of quantum in any individual case.

7.5 Similarly, there would appear to be scope for the Commission to provide guidance on the application of evidential presumptions in the context of damages but where those presumptions might, in the ordinary way, be rebutted should the particular facts of the case merit that result.

8. PASSING ON OVERCHARGES

8.1 The Commission's proposals appear sensible, whilst any steps to resolve this issue are welcome and likely to promote private enforcement.

8.2 The operation of the rebuttable presumption is supported.

9. LIMITATION PERIODS

9.1 In the UK, a follow-on action presently benefits from a two year limitation period which does not begin to run until the infringement decision upon which reliance is placed becomes final with any appeal having been time-barred or having run its course.

9.2 However, care needs to be taken to ensure that the operation of a floating limitation period of this sort does not unreasonably delay private enforcement against those defendants who have no grounds to appeal an infringement decision but whether others on the same facts have.

9.3 This issue was considered by the CAT recently in *Emerson Electric and ors v Morgan Crucible plc and ors* (see [2007] CAT 28). By way of background, the limitation period from bringing such an action will not begin to run until the infringement decision becomes final. The CAT may, however, give permission for a claim to be brought before that date.

9.4 The case concerned the question of when time begins to run in a cartel case in which one of the addressees of the decision (the whistleblower) had not appealed to the European Court but the appeals of its co-cartellists were still pending. The CAT held that time only began to run when all the appeals against the decision had been determined – the decision for these purposes meaning the decision as it related to all addressees not just the addressee that had not appealed. Accordingly proceedings against even the non-appealing addressee of the decision could not be commenced as of right and required the permission of the Tribunal.

9.5 The circumstances in which the Tribunal will give permission for a claim to proceed before the decision becomes final are as yet relatively undeveloped. Such cases would appear to be the exception rather than the rule. Concerns about the preservation of documents that might affect the integrity of any claim can be a ground for granting permission, as was the case in relation to Morgan Crucible in the Emerson case (see [2007] CAT 30). Another possible situation in which permission may be granted is where any appeals against the decision do not have any implications for that part of the decision which finds an infringement.

9.6 In Emerson the CAT granted permission to bring a claim against Morgan Crucible based on the Commission's decision finding an infringement of Article 81 in the electrical and mechanical carbon and graphite products market, but not against the other addressees who appealed against the infringement decision (see [2008] CAT 8).

9.7 Where permission is given to proceed against a non-appealing addressee as in Emerson it is unclear whether the CAT will allow the claim to proceed to a full determination against that defendant or whether it will only allow it to proceed to the extent necessary to fulfil the purpose for which it gave permission, e.g. the preservation of documents and then stay the proceedings until the appeals of the other addressees have been determined.

9.8 Moreover, as the liability of cartellists is likely to be joint and several (although there has been no formal decision to this effect by the Courts in England and Wales) the non-

appealing addressee is likely to find itself sued for the entire losses incurred by a major international cartel, whether or not the sales it made to the claimants were significant. This may make it difficult for that defendant to reach an early settlement with the claimants on the basis of its own individual liability. Moreover, the person likely to be facing such a claim based on joint and several liability is the whistleblower, which assisted the authorities with their investigation and did not appeal, yet then finds itself facing a claim in damages which could well exceed the amount of any penalty it might otherwise have faced but for its successful leniency application. Normally the defendant in such circumstances could issue a claim for contribution against its fellow joint tortfeasors. However there are problems in doing so in a follow-on action while the appeals of those joint tortfeasors against the decision have not yet been determined. In addition, there are likely to be formidable procedural difficulties in managing such a case for both the claimants and the defendants, for example in obtaining access to relevant documents from the other addressees of the infringement decision.

9.9 Again, the Commission should give further consideration to these issues and consider the scope for guidance.

10. COSTS OF DAMAGES ACTIONS

10.1 The Commission's support of the 'loser pays' principle in limiting unmeritorious claims is supported, subject to appropriate constraints exercisable through the grant of a wide discretion on the part of the trial judge to apply that principle in a fair way, on the facts before the court.

10.2 Cost capping is an appropriate mechanism to control costs which have a particular tendency to be significant in anti-trust cases due, in no small part, to the relative novelty and complexity of many of the legal issues involved and the use of expert evidence on economic and other issues.

10.3 Conditional fee arrangements, which provide for an uplift in the fees awarded to the successful party but where the legal representatives of a losing claimant agree to forgo in whole or part their costs, represent valid options to encourage access to justice. However, their application in stand alone applications is extremely limited, given the perceived high risk that such actions will fail.³ The CLA would be against measures that awarded legal representatives damages on the basis of a percentage of damages awarded, given the high potential for such measures to give rise to conflicts of interest between representative and client, and foster vexatious litigation.

10.4 There should be scope to explore novel measures to foster early and cost efficient settlement of private damages actions. Examples worth further consideration include: the establishment of specialist arbitration panels to hear competition disputes; the encouragement of third party funding and measures to control its scope; or the obligatory reference of claims for preliminary review by a specialist body following an infringement finding.

10.5 In particular, consideration should be given to the introduction of an express factor to mitigate the size of fine where the defendant had taken steps or otherwise committed to set up a fund or other mechanism to compensate victims of the infringement. It would also be possible to incorporate such a provision in early settlement procedures recently established by the Commission.

³ Where, for example, Arkin cited above was brought upon the basis of a CFA and resulted in a significant amount of legal work being undertaken for no reward once the action had failed.

11. INTERACTION BETWEEN LENIENCY PROGRAMMES AND ACTIONS FOR DAMAGES
- 11.1 The Commission has cast the scope of the protection to be afforded to leniency applicants too widely.
- 11.2 As a general principle, leniency grants the beneficiary protection against fines and should not limit the right of recovery of an innocent victim against the third party concerned.
- 11.3 In particular, the suggestion that a leniency applicant's liability in damages should be limited to its direct and indirect contractual partners is not fully understood. If it is intended to exclude claims by end purchasers from bringing an action against the leniency applicant then it appears too wide; it is unfair that innocent purchasers should be denied compensation from the leniency applicant particularly where that applicant has already escaped punishment through fines.
- 11.4 In contrast, a more limited measure which precludes early actions being brought against the leniency applicant alone on a joint and several basis would be supported. Whilst there is no reason for removing the obligation to compensate because leniency has been obtained, there are also good arguments that a successful leniency applicant should not be exposed to a greater or earlier extent than its fellow conspirators merely as a function of the fact that it has sought leniency.

UK CLA PRIVATE ACTIONS WORKING PARTY

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