

1. **INTRODUCTION**

1.1 Maclay Murray & Spens welcomes the opportunity to comment on the Office of Fair Trading’s (OFT) discussion paper on “Private Actions in Competition Law: effective redress for consumers and business” (the “**Discussion Paper**”). 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. We begin with some general observations on the Discussion Paper, before going on to highlight some specific issues in relation to the Scottish legal system.

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 appropriately 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. As recognised by both the OFT and the European Commission, 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.

3. **REPRESENTATIVE ACTIONS**

3.1 We support the proposal outlined in paragraph 4.5 that the OFT should encourage the introduction of an EU-wide instrument, obliging all Member States to establish an effective means of collective address, for example, along similar lines to section 47B of the Competition Act 1998.

3.2 The OFT suggests widening the scope for representative actions by allowing duly authorised bodies to bring both follow-on and stand-alone actions, on behalf of consumers or businesses, as appropriate. We welcome this expansion of the existing options for representative actions, specifically with respect to the benefits it would bring to small businesses. It would, as the OFT recognises, be important to guard against representative bodies seeking to promote their own rather than claimants’ interests.

3.3 Paragraph 4.17 notes that the OFT may itself wish to apply to the Secretary of State to become a specified body in due course, a point made by the OFT in its response to the European Commission’s Green Paper. We believe that the OFT should continue to focus on public enforcement, whilst facilitating the climate for others to take forward private actions. Involving the OFT directly in private actions would complicate its existing role as a public enforcer and would seem to give rise to various issues of conflict of interest which have not been addressed.

For example, with respect to documents obtained by the OFT during an investigation, including statements made by a leniency applicant, the OFT would appear to have an inherent advantage in the level of knowledge it has in a follow-on case, notwithstanding the restrictions on disclosure of evidence. We also consider that there are conceptual difficulties with the OFT being entitled to “punish infringers twice”, once in its public role by imposing penalties and once in its private role by seeking damages.

- 3.4 We would favour an “opt-in” system rather than an “opt-out” one. This is because the development of private actions should not be made at the expense of individual freedom to take appropriate action, or otherwise, to redress a wrong. If sufficient interest in taking a representative action has not been generated by the infringement of competition law itself, despite the ongoing cultivation of a culture of enforcing rights (including, for example, publicising the options), then it should not be viewed as a failure of the system that no action is taken. On the contrary, there are perhaps other cases which better merit the time and resources involved in their pursuit. If the culture of competition is properly attended to, the required number of claimants should be willing to be involved in an action on an “opt-in” basis, without the need for a “consumers at large” approach which could risk tipping the balance towards a litigation, rather than compliance, culture. In many cases, the damage suffered by a customer will be addressed through a price re-negotiation, and customers should be free to use this means of redress if it is available to them.

4. **COSTS AND FUNDING ARRANGEMENTS**

- 4.1 We agree that the available means of privately funding civil actions and insuring against unfavourable outcomes could be improved. There would seem to be less of a need to increase the incentives for lawyers in relation to follow-on actions (where the main issue will be quantum rather than liability) than in stand-alone actions. That said we would support the proposal for allowing higher uplifts, with the further increase being met from damages recovered rather than from the losing party.

5. **EVIDENTIAL ISSUES AND APPLICABLE LAW**

- 5.1 In relation to information held by the OFT, it is important (as does appear to be recognised by all parties involved in the private enforcement debate) that the correct balance is found between public enforcement and the continued success of the leniency regime on the one hand and the development of private actions on the other.
- 5.2 We support the proposal to remove joint and several liability for the immunity recipient. One specific issue is that because the parties to the cartel who are fined are likely to appeal, the

immunity recipient is vulnerable to being sued in the CAT before the other parties. The removal of joint and several liability from the party receiving immunity would reduce this effect.

5.3 We support the proposal that NCA decisions be given binding effect in the UK courts in the same way as an OFT or Commission decision. However, we wonder whether this will have a significant effect in practice in bolstering UK competition litigation.

5.4 Since the aim is to compensate those who have suffered loss, it follows that indirect purchasers should be permitted to sue for damages. It also follows that the passing on defence should be allowed in quantifying the damage suffered (otherwise, intermediate purchasers will be over-compensated). Reversing the burden of proof would in practice encourage more claims and we support this change although it shifts the balance in litigation quite significantly. Reversing the burden of proof on a case by case basis might be preferable but this would lead to less predictable results.

6. SCOTLAND

6.1 Separate legal system

Scotland has a separate and significantly different legal system from that in England and Wales. We welcome the OFT's willingness to take those differences into account in developing its proposals.

6.2 Representative actions

Apart from representative follow-on actions in the CAT under section 47B of the CA 1998, there is currently no mechanism in the Scottish system which would allow for either consumers or businesses to take any kind of joint legal action, either on a follow-on or stand-alone basis.

At present, where there are a number of claims dealing with similar issues, there is no formal means of streamlining the process for dealing with related or similar claims. However, the cases will be managed on an ad hoc basis. The actions have to be commenced as individual actions, but may be formally conjoined (or, at least, informally processed together) at a later stage. Depending upon the nature of the claims, the Scottish Courts have been willing to seek to identify common issues (of law and/or fact) that may be relevant to all (or some) of the multiple claims, and thereafter to designate a "lead" action (or actions) to go forward to a determination of such issues. However, the parties each bear the costs of commencing their individual legal proceedings; and the "lead" claimant (pursuer) bears all the cost and risks of that litigation. Naturally, that lead claimant can seek damages only for personal loss (not for the loss of others

similarly affected). There is no equivalent to Group Litigation Orders in England and Wales (Civil Procedure Rules, part 19).

The assignation of individual rights of action would be possible in Scotland.

Civil procedure in the Court of Session is determined by the Rules of the Court of Session. These Rules are found in Schedule 2 to the Act of Sederunt (Rules of the Court of Session) 1994 (SI 1994/1443). They were issued by the judges of the Court of Session in exercise of the powers conferred by the Court of Session Act, Sections 5 & 6 allowing the Court to regulate its own procedure. (Civil procedure in the sheriff courts is regulated from various sources, but the Court of Session is likewise empowered to regulate and prescribe such procedure in the sheriff courts by means of Act of Sederunt, pursuant to Section 32 of the Sheriff Courts (Scotland) Act 1971.) The Rules of the Court of Session and sheriff courts are supplemented by sundry Practice Notes and conventions. . In theory, a new form of representative action could be introduced to the Court of Session and sheriff courts by means of Act of Sederunt (issued, respectively, pursuant to the 1988 Act and 1971 Act), rather than requiring primary legislation. Since the regulation of Scottish judicial procedure is a devolved matter, albeit, in this context, touching upon a reserved aspect of substantive law, any primary legislation to ordain or implement such changes in Scottish judicial procedure ought to be enacted by the Scottish Parliament..

6.3 **Costs and funding**

The general rule is that judicial expenses (costs) follow success, although the courts do retain discretion to reverse or modify this rule, where appropriate, and, as in England and Wales, there is a taxation process which seeks to ensure that costs recoverable from an opponent in litigation are reasonable. However, in Scotland, unlike England and Wales, courts do not have jurisdiction to make cost-capping orders.

With respect to footnote 30 in the Discussion Paper (discussing *Arkin v Borchard Lines*), courts in Scotland have power to impose liability for judicial expenses on a person who is not a party to the action but who, in the Court's opinion, has the true interest in the cause, and who exercises the control and direction of it. Such a third party is known as a *dominus litis*. That said, it is rare for such a finding in expenses to be made against a non-party to the litigation. A party who merely funds a litigation (or part of it), even if it has an indirect interest in the sense of some ultimate consequential benefit, is unlikely to be susceptible to liability in expenses as a *dominus litis* (*O'Connor v Bullimore Underwriting Agency Ltd* [2005] CSOH 90) .

6.4 **Evidential issues**

The Scottish system of disclosure differs significantly from that of England and Wales.

In some respects, the Scottish system is narrower than that of England and Wales in that the claimant in Scotland must apply to the Court for an order authorising the recovery of any documentary evidence; such an application must specify in sufficient detail the documents (or category of documents) that is sought to be recovered; the documents sought must be relevant to the issues in dispute; and the documents sought must be required by the applicant for the purpose of proving the applicant's case (or, at least, for the purpose of allowing the applicant to make more specific the existing averments in his pleadings). There is no automatic requirement for an allegedly infringing party to disclose documents which might be relevant or damaging to its case. A "fishing search" which is regarded as being either too wide in its terms, or has no direct relevance to the issues in dispute (as they appear in the parties' pleadings at the time of the application), will not be allowed. Opposition to, and critical judicial scrutiny of, applications for the recovery of documentary evidence in Scottish civil proceedings is common-place.

However, in other respects the system in Scotland is a broad one. In particular, documents may be sought from any "haver" (not just the defender) who is subject to the jurisdiction of the Scottish Courts including, for example, the OFT. Recovery of documents may also be sought, in certain circumstances, before commencing an action (under the Administration of Justice (Scotland) Act 1972).

In any event, the recovery of documentary evidence under Scottish procedure is subject to the exercise of familiar pleas and privileges (including confidentiality, legal professional privilege etc).

6.5 **Pre-action settlement**

In Scotland, in the Court of Session, a competition claim may proceed under the so-called ordinary procedure or the commercial procedure. Under the ordinary procedure, there is little by way of formal case management and the progress of the case depends in large part on the parties and the lawyers involved. Under the commercial procedure, a case is allocated to a specific judge who plays far more of an interventionist role in the progress of a case, allowing it to proceed in a more stream-lined manner. (A similar procedural distinction exists under the sheriff court Rules. However, only two of the multiple sheriff courts in Scotland (namely, Glasgow and Aberdeen Sheriff Courts) have, to date, elected to introduce a commercial procedure.)

Section 7 of the Discussion Paper deals with effective claims resolution and the opportunities available to reach a settlement, such as the use of "pre-action protocols" in England and Wales to

encourage early exchange of information. Under the Court of Session commercial procedure in Scotland, there is a practice note (Practice Note No 6 of 2004) which requires an exchange of information between the parties before an action is raised (this is not available in ordinary procedure). However, although the Practice Note recommends considering whether an alternate means of dispute resolution is suitable, a failure to mediate will not be held against parties at a later stage in legal proceedings.

6.6 General procedure

Although all claims arising in England and Wales pleading a breach of EC or UK competition law must be issued in or transferred to the High Court, there is no equivalent rule in the Scottish court system. Therefore, a claim relating to competition law can be brought in either a Sheriff Court or the Court of Session.

There are various factors which will influence where a claim is brought:

- Cost is likely to be a factor in deciding where to bring an action. For various reasons it is generally thought that it is cheaper to pursue an action in a Sheriff Court than in the Court of Session. For example, in the Court of Session, only Advocates and Solicitor Advocates have rights of audience, whereas, in a Sheriff Court, all solicitors have rights of audience. That may mean additional costs for hiring an advocate. On the other hand, a solicitor specialised in competition law would be entitled to appear to argue a case first hand in the Sheriff Court. That said, in the longer term, a Sheriff Court action may not be cheaper as an extra (optional) level of appeal (to the Sheriff Principal) is available to the unsuccessful litigant.
- An advantage of the sheriff court may be geographic proximity (to the claimant and/or his witnesses).
- Monetary claims not exceeding £750 in value (exclusive of interest and expenses) must be brought under the small claims procedure in the Sheriff Court. The recoverability of judicial expenses in a small claim action is extremely limited.
- Monetary claims not exceeding £1,500 in value (exclusive of interest and expenses), but exceeding £750, must be brought under the summary cause procedure in the Sheriff Court.
- Monetary claims exceeding £1,500 in value can be pursued in either the Sheriff Court or the Court of Session. (There is no maximum limit on monetary claims which can be brought in the Sheriff Court.)

- The Court of Session may, in due course, acquire a degree of expertise and familiarity with competition law issues which might be less likely to arise in the Sheriff Courts. Assuming this occurs, this could make the Court of Session more attractive over time than the Sheriff Courts.

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