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Paul Scully MP
Minister for Small Business, Consumers & Labour Markets
Department for Business, Energy & Industrial Strategy
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Dear Mr Scully MP

Call for Evidence – Post-implementation review of the Competition Appeal Tribunal Rules 2015

1. Introduction

1.1 We refer to the Call for Evidence dated 16 March 2021 (the ***Call for Evidence***) issued as part of the post-implementation review of the Competition Appeal Tribunal Rules 2015 (the ***Review***) by the Department of Business, Energy and Industrial Strategy.

1.2 The relevant objectives of the Review are (together, the ***Intended Objectives***):

(a) To minimise unnecessary costs and delays whilst balancing proper accountability for decisions;

(b) To ensure effective case management; and

(c) To provide a framework for the Competition Appeal Tribunal's (the ***Tribunal***) extended jurisdiction in private law actions related to infringements of competition law (as set out in the CRA 2015).

1.3 The specific questions to be considered by the Review, as set out at page 13 of the Call for Evidence, are:

(a) **Question 1:** To what extent have the objectives intended to be achieved by the regulatory system established by the 2015 Rules been achieved?

(b) **Question 2:** Do those objectives remain appropriate and, if so, to what extent could they be achieved with a system that imposes less regulation?

1.4 We understand that the Call for Evidence seeks the views of "*those with an interest in the application of the CAT Rules 2015*", which includes "*solicitors practicing in the areas of competition, public law and commercial litigation*".[1] This submission is made on behalf of Scott+Scott UK LLP[2] (***Scott+Scott***). Scott+Scott is a specialist dispute resolution firm whose solicitors have extensive experience in competition litigation, including before the Tribunal. Scott+Scott is involved in competition damages

[1] Page 6, Call for Evidence.

[2] Scott+Scott UK LLP is affiliated with Scott+Scott Attorneys at Law which operates Scott+Scott offices within the United States of America in New York, California, Connecticut, Virginia, Ohio, Arizona, and with The Netherlands in Amsterdam, and Scott+Scott Germany LLP, which operates in Berlin.

actions before the Tribunal, including two collective actions[3] under the Consumer Rights Act 2015 (the ***CRA***) and a number of individual multilateral interchange fee actions against Visa and Mastercard which were transferred from the Business & Property Courts to the Tribunal in March 2021. Scott+Scott's competition damages practice focusses on acting for claimants.

1.5 We have found the Tribunal to be efficient, modern and user-friendly. In the following sections, we provide our submissions on points we consider will assist the Tribunal to further bolster the Intended Objectives and the effective administration of justice and which have emerged from our work advising clients who are, or who are contemplating, litigating private damages cases before the Tribunal.

1.6 In the remaining sections, for ease of review, we define the CAT Rules 2015 and the proposed new rules as the '***2015 Rules***' and the '***Updated Rules***', respectively.

1.7 In summary, we propose the following:

(a) **Carriage disputes**: The introduction of a deadline of 60 days after the filing of a collective action for the filing of any rival collective action instigating a carriage dispute,

(b) **Opt-in / opt-out**: Clarification of Rule 79(3) of the 2015 Rules to provide that the Tribunal need only consider whether an opt-out claim would be better brought as an opt-in claim where there is a proposed class representative seeking to, or offering in the alternative to, bring and opt-in claim.

(c) **Transitional rules**: Rule 119 of the 2015 Rules should be amended to allow stand-alone hybrid claims to be brought relating to anticompetitive conduct prior to 1 October 2015 where the anticompetitive conduct overlaps that date by beginning before 1 October 2015 and continuing after it.

(d) **Distribution costs in collective actions**: The Updated Rules should establish a presumption that following judgment in any collective proceedings, the Tribunal will order that the defendants pay the post-judgment noticing and distribution costs as these costs arise,

(e) **Witness evidence**: The Updated Rules should clarify whether the new witness statement rules in Practice Direction 57AC apply to trial witness statements in the Tribunal in claims which have been transferred from the Business & Property Courts under Rule 71 of the 2015 Rules.

(f) **Transfers from the High Court**: Rule 72(2) of the 2015 Rules should be amended to provide that when a claim is transferred to the Tribunal from the High Court, the claimant has 7 days from being provided with the sealed order of transfer to file the relevant documents with the Tribunal (rather than 7 days from the order being made).

2. 'Carriage disputes' and timing

2.1 In the context of collective actions, Rule 78(2)(c) of the 2015 Rules requires consideration of whether: "*if there is more than one applicant seeking approval to act as the class representative in respect of the same claims,* [the proposed class representative] *would be the most suitable.*" The consideration of which proposed class representative is the more suitable representative is now commonly referred to as a 'carriage dispute'.

2.2 There are no provisions in the 2015 Rules which set a 'cut-off date' beyond which a rival collective action may not be filed. This means that a rival application could be filed at any point up to the collective proceedings order (***CPO***) being made, even, theoretically, after the CPO application hearing but prior to judgment.

2.3 Where a rival collective action is filed after the case management conference at which the CPO hearing date in the original action has been ordered and the timetable to that hearing is set, there is a

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3 (1) *Michael O'Higgins FX Class Representative Limited v Barclays Bank Plc & Ors* (Case No. 1329/7/7/19); and (2) *Mark McLaren Class Representative Limited v MOL (Europe Africa) Ltd & Ors* (Case No. 1339/7/7/20).

considerable likelihood that the filing of a rival collective application will cause delay and potentially require changes to the timetable. The later that such a rival action is filed, the greater the likelihood that it could lead to the scheduled CPO hearing having to be vacated in order to allow the rival action to catch up. This would not be in the interests of the class that the proposed class representatives seek to represent, would increase costs for all parties, cause inconvenience to the Tribunal, and would not be in the spirit of the Intended Objectives.

2.4 Further, we understand from discussions with litigation funders and after-the-event (***ATE***) insurance providers that the risk of a competing subsequent CPO application being filed, and the current uncertainty about how these will be resolved, is a deterrence to funding and providing insurance for future collective actions. Accordingly, to ensure access to justice through the availability of funding and ATE insurance, and to minimise costs and delays, it is submitted that greater certainty on how carriage disputes will be addressed is needed and there should be constraints on the filing of later collective actions.

2.5 We recognise that there may be situations where two different proposed class representatives develop the same or very similar collective actions in parallel, unaware that there is a rival claim until it is filed, and similarly that there may be good reasons to prefer one claim over another. We therefore do not advocate an automatic "first to file" rule in which the first Proposed Representative who files a CPO application will always be selected to represent the class, as this may encourage a 'race to the courthouse' with poorly developed claims. However, we suggest that an appropriate balance could be struck by instituting a cut-off date beyond which a rival CPO application could not be brought, or at least could not be brought without the permission of the Tribunal, which would only give such permission where there was a compelling reason to do so.

2.6 We note that in Ontario, Canada, section 13.1(3) of the Ontario Class Proceedings Act 1992 (as amended) provides: "*A carriage motion shall be made no later than 60 days after the day on which the first of the proceedings was commenced, and shall be heard as soon as is practicable*". Including a rule along these lines in the Updated Rules would provide comfort to the first-mover (and its funders and ATE insurers) that its investment will likely only face a carriage dispute if another proposed class representative is developing the same action in parallel, and not by pure copy-cat actions. It would also reduce delay and minimise costs that may otherwise be caused by the need to amend timetables and/or reschedule CPO application hearings in light of later-filed CPO Applications.

3. Opt-in versus opt-out

3.1 We consider the availability of both opt-in and opt-out proceedings to be a positive feature of the collective proceedings regime. There may be circumstances in which a case would more naturally lend itself to one or other of opt-in and opt-out and we believe it is an important point for prospective class representatives to consider when bringing a collective action.

3.2 Rule 79(3) of the 2015 Rules states that in determining whether collective proceedings should be opt-in or opt-out, the Tribunal may take into account the strength of the claims and whether it is practicable for the proceedings to be brought as opt-in collective proceedings, having regard to all circumstances. The Rule is (arguably) ambiguous as to whether the Tribunal must consider this question in all cases, or only in cases where both opt-in and opt-out certification is sought by the proposed class representative(s).

3.3 We regard the better reading, and the correct position as a matter of policy, is that the Tribunal should only consider this factor if the Tribunal is faced with two similar claims, one brought on an opt-in basis, the other brought on an opt-out basis,[4] or where a single claim is brought as opt-out or opt-in in the alternative (whether expressly or where the class representative states that the claim could viably be

[4] By way of example, the recent hearing of the CPO Applications in Case 1289/7/7/18 *Road Haulage Association Limited v Man SE and Others* and Case 1282/7/7/18 *UK Trucks Claim Limited v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) and Others*, in which it was faced with this scenario.

reformulated from opt-out to opt-in). In our view, if the Tribunal is not presented with both options by the proposed class representative(s), considering whether a claim should be opt-in or opt-out should not form part of the assessment of suitability for certification.

3.4 Paragraph 6.39 of the 2015 Guide states that "*there is a general preference for proceedings to be opt-in where practicable*". The wording of the Guide again (arguably) creates ambiguity around the effect of Rule 79(3) of the 2015 Rules and the circumstances in which the "*preference*" for opt-in proceedings would apply. This creates scope for defendants to argue that a claim which is brought on an opt-out basis should only be certified as opt-in, even if a class representative considers an opt-in claim to be unviable and is unable or unwilling to bring the claim on that basis. If the defendants successfully argue the point, this would prevent certification, creating a barrier for access to justice and ultimately allowing defendants to defeat the action and avoid paying compensation.

3.5 We also question the basis for the Guide to express this preference, which does not appear to us to be grounded in the legislation or wording of Rule 79(3).

3.6 Considering the viability of an opt-in claim should not form part of the assessment of suitability of claims brought on an exclusively opt-out basis. Rule 79(3) and the paragraph 6.39 of the 2015 Guide should be amended to reflect this in the Updated Rules.

4. Transitional Rules

4.1 The effect of the transitional provisions contained in Rule 119 of the 2015 Rules has been subject to commentary since the coming into force of the Consumer Rights Act 2015. Simply put, the effect of Rule 119 means that for pre-1 October 2015 anticompetitive conduct a damages claim, including a collective action, can only be brought in the Tribunal following on from an infringement decision by a UK or EU competition regulator. By contrast, for post-1 October 2015 anticompetitive conduct, a damages action can be brought in the Tribunal without the need for a regulatory decision, so could therefore be follow-on, stand alone or hybrid.

4.2 The result of Rule 119 is that, for anticompetitive conduct which overlaps the pre- and post-1 October 2015 periods, a damages claim could be brought for the post-1 October 2015 period without the need to wait for a regulatory decision, but could only be extended to the earlier period if there was subsequently a regulatory decision from which to follow-on. The key question for whether a claim is suitable for a collective action is therefore not when the regulatory decision is made, but rather when the anticompetitive conduct occurred.

4.3 In *Gibson v Pride,* regarding the first collective action under the CRA regime, the Tribunal noted in paragraph 110 that it may seem "*harsh*" to prevent hybrid standalone/follow CRA collective actions but that the "*degree to which collective proceedings could stretch back before 1 October 2015 is of wider significance and the transitional rule represents a policy decision by the Government, endorsed by Parliament*" and therefore could not be departed from.[5] While the passage of time has lessened the impact of Rule 119 somewhat, we submit that the 'harshness' of the rule be mitigated in the Updated Rules and that the Updated Rules should allow hybrid / standalone collective actions where at least a part of the anti-competitive conduct pre-dates 1 October 2015. This would prevent the artificial demarcation between the ability of victims of anticompetitive conduct to obtain compensation for the pre and post 1 October 2015 period.

5. Costs of distribution

5.1 Rule 93 of the 2015 Rules deals with distribution of an award of damages. Rule 93(4) states that where the Tribunal is notified that there are undistributed damages, it may make an order that all or part of any undistributed damages is paid to the class representative in respect of all or part of any

[5] Case 1257/7/7/16 *Dorothy Gibson v Pride Mobility Products Limited* [2017], CAT 9, paragraph 110.

costs fees or disbursements. Rule 98(1) states that costs may be awarded to the class representative.

5.2 Although there have yet to be any final judgments awarding damages in collective actions, we assume that the costs of post-judgment noticing and distribution are necessarily costs of the litigation so would ultimately form part of a costs award pursuant Rule 98(1) of the 2015 Rules or be payable from undistributed damages. However, this is not explicitly stated in the Rules, nor is there any provision requiring the defendants to pay for the costs of distribution as they are incurred.

5.3 Based both on our firm's experience in the United States and on discussing likely costs with claims administrators pitching for work in collective actions before the CAT, a thorough noticing programme and robust distribution process for large classes can be extremely expensive – often in the millions of pounds.

5.4 Absent any requirement that the defendants must pay for these costs as they are incurred, these upfront costs would have to be met by the class representative, with a view to seeking recovery from the defendants under Rule 98(1) and/or from the undistributed damages under Rule 93(4) after distribution is complete. In order to be able to meet these costs as they arise, the class representative will require funding from the litigation funder, and the litigation funder will understandably expect a return on the capital committed to meet these costs.

5.5 This means that a budget for a collective claim ought to include the costs of distribution of any judgment in the class representative's favour. As funders typically require a claim value to be a certain multiple of the funding required, including funding for distribution in the budget will have a disproportionate effect on the value that the claim must have in order to attract funding. For example, in a case where the post-judgment noticing and distribution costs £2 million, this could add £20 million to the threshold value to obtain funding for a claim where the funder requires a 1:10 claim to damages multiple. This additional £20 million in claim value could be a barrier to being able to obtain funding to bring what would otherwise be a strong claim.

5.6 We suggest that the Updated Rules should give set a presumption that the Tribunal will order that the defendants pay the post-judgment noticing and distribution costs as these costs arise, or at least state that the Tribunal has the discretion to make such an order. This would remove the need for a prospective class representative to obtain funding for notice and distribution costs from the outset of the claim.

6. Rules on Witness Evidence

6.1 We refer to the introduction of the new rules on trial witness statements in the Business & Property Courts on 6 April 2021 in Practice Direction 57AC and its Appendix, the Statement of Best Practice.

6.2 We suggest that the Updated Rules provide guidance on whether the new witness statement rules in Practice Direction 57AC apply to trial witness statements in the Tribunal in claims which have been transferred from the Business & Property Courts under Rule 71 of the 2015 Rules. The Tribunal may also wish to consider whether or not to adopt these rules for cases initiated in the Tribunal.

7. Transfer to the Tribunal

7.1 Rule 72 of the 2015 Rules relates to the transfer of claims to the Tribunal. Rule 72(2) requires the party bringing the claim to file specified documents with the Tribunal Registry "*within seven days of the order of the court transferring the claim or such other period directed by that court*".

7.2 In our experience there can be a delay with the High Court between: (i) a Master ordering transfer of a claim; (ii) the date of sealing the order to transfer the claim; and (iii) the date the sealed order to transfer the claim is issued by the Court to the party. If this sequence of events takes a few days, it can make it difficult for the claimant to comply with the seven-day period permitted under Rule 72(2). This is particularly so in group litigation with multiple claims and numerous documents. We suggest

the Updated Rules clarify that the seven-day period runs from the date of the "*sealed order of the court for transferring the claim…*" being returned to the parties.

8. Conclusion

8.1 We are grateful for the opportunity to provide these submissions. We would be very happy to discuss or provide further detail on any of the above points if it would be of assistance.

Yours sincerely

Scott+Scott UK LLP

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