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Submissions of Hausfeld & Co. LLP following

The Department for Business, Energy & Industrial Strategy's call for evidence for the post-implementation review of the Competition Appeal Tribunal Rules 2015

A. Introduction

1. In March 2021, the Department for Business, Energy & Industrial Strategy ("**BEIS**") published a call for evidence for the post-implementation review of the Competition Appeal Tribunal ("**Tribunal**") Rules 2015 (the "**Rules**") (the "**BEIS Paper**"[1]).

2. The below submissions are made by Hausfeld & Co. LLP in response to the BEIS Paper. The firm specialises in claimant litigation with twelve offices in Europe and in the US, and has significant experience in competition litigation before the Tribunal, the High Court and in jurisdictions outside of England & Wales. More information is available here.

3. In the period since the introduction of the Rules, Hausfeld has acted for claimants before the Tribunal in both follow-on cartel damages claims on behalf of individual and groups of claimants[2] and in a number of the first collective opt-out claims issued under the new collective regime introduced by the Rules[3].

4. We have considered the questions set out in the BEIS Paper in light of our experience over the last five years and have collated our responses under generic headings, as explained below.

B. General observations

5. This section of our response is focused on general rules applicable to all forms of proceedings in the Tribunal. We comment specifically on the Rules surrounding collective proceedings in Section C.

Covid-19 Practice Direction

6. On 20 March 2020, the Tribunal published Practice Direction 1/2020 "*Covid-19 – Filing and Hearing Arrangements to navigate the situation concerning Covid-19*" (the "**CV19 PD**")[4]. We consider that many of the directions put in place to have been successful for the purposes of dealing with the circumstances brought about by the pandemic, but also more broadly that a number of the changes have made the conduct of litigation more efficient and cost-effective, such that consideration should be given to the extent to which some of the changes should be retained. Those are as follows:

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[1] Available here.

[2] Including (without limitation) in *Trucks* (cases *1292/5/7/18; 1293/5/7/18; 1294/5/7/18; 1355/5/7/20; 1356/5/7/20; 1358/5/7/20; 1371/5/7/20; and 1372/5/7/20*), *Car Glass* (cases *1244/5/7/15* and *1256/5/7/16*), *Bearings* (case *1248/5/7/16*) and *Maritime Car Carriers* (cases *1346/5/7/20* and *1347/5/7/20*).

[3] Including in *Train Boundary Fares* (cases *1304/7/7/19* and *1305/7/7/19*), *Forex* (case *1336/7/7/19*) and *Qualcomm* (case *1382/7/7/21*).

[4] *Practice Direction relating to Covid-19 – Filing and Hearing Arrangements* (20 March 2020) – available here.

a) The direction for claims to be filed electronically instead of requiring multiple hard copies to be filed at the Tribunal (as required under Rule 30(6)) is far more efficient both in terms of time and cost, as well as being a more environmentally friendly approach – we would fully support this practice being retained in the longer-term.

b) Whilst it is anticipated that hearings will be able to resume in-person later this year, we consider the transition from hard copy bundles to electronic bundles ("**e-bundles**") for use at hearings to have been a success, with the production and usage of e-bundles being much more efficient. Benefits of e-bundles include, among others: (i) less time and costs spent printing and preparing hard copy bundles; (ii) ease of updating and maintaining e-bundles with additional documents (particularly as a trial progresses with documents in the bundle being added, replaced or removed); (iii) the speed at which e-bundle providers are able to pull the correct documents up on screen for all parties to see; and (iv) the significant environmental benefits of e-bundles, with many hardcopy bundles running to several volumes and thousands of pages per set. We further note that Mr. Justice Roth made positive comments regarding an e-bundle provider at the recent CPO hearing in the *Trucks* collective actions.[5]

c) Given the general success of remote hearings during the period of the pandemic, the Tribunal may wish to consider retaining the option for remote hearings where those hearings are sufficiently short (for example, in respect of interlocutory applications) or indeed in respect of short case management conferences ("**CMC**"). This would avoid the need for various parties to have to travel to the Tribunal, thereby creating efficiencies in the ability to hold hearings expeditiously and reducing hearing costs.

7. We would therefore suggest that consideration is given to retaining some of the successful directions contained in the CV19 PD in the longer-term.

Commencement of proceedings

8. Claimants are subject to a high evidentiary burden at the outset of competition damages claims in the Tribunal, in particular as to making clear their case on quantification. Rule 30(e)(i) requires that a claimant must, on commencement of proceedings, enclose with the claim form "*an estimate of the amount claimed in damages, supported by an explanation of how that amount has been calculated*". In practice, this will typically require expert input at this preliminary stage.

9. Due to the asymmetry of information between parties at the outset of competition proceedings, particularly (but not exclusively) as regards standalone claims, there is a question as to the usefulness of expert analysis at this preliminary stage. In our experience,

[5] *1289/7/7/18*: *Road Haulage Association Limited v Man SE & Others* and *1282/7/7/18*: *UK Trucks Claim Limited v Stellantis N.V. (formerly Fiat Chrysler Automobiles N.V.) & Others*.

evidence obtained to support a claim at this early juncture will inevitably change following disclosure and is typically criticised by defendants as failing to factor in information which is not available to claimants pending disclosure. The requirement to include an estimate of damage at this stage will typically increase costs without significantly contributing to advancing the litigation at that point. In some cases, this may also act as a deterrent to some claimants from bringing proceedings altogether, including scenarios in which claimants are subject to an imminent limitation deadline.

10. By contrast, in the High Court, a claimant has the option to file a claim form with particulars to follow. The particulars are only required to set out, in broad terms, particulars of loss and damage and there is no requirement to enclose an estimate of damages and supporting explanation (as is the case in the Tribunal). The process in the High Court is therefore, in comparison, more straightforward given there is no need to front-load any of the economic analysis and often leads to claimants preferring to file proceedings in the High Court where possible, despite the anticipation of the proceedings being later transferred to the Tribunal.

11. We would therefore suggest the requirement in the Rules for a preliminary estimate of damages, and explanation thereof, is reconsidered.

Case management

12. In our experience, the Tribunal's proactive and pragmatic approach to case management generally works well. This is particularly evidenced in the *Trucks*[6] litigation, where various analogous claims are jointly case-managed – and therefore will avoid the issues of conflicting judgments which resulted from (and which may result from) the *Interchange*[7] litigation. Therefore, in broad terms, we would welcome a continuation of this approach by the Tribunal in respect of its day-to-day management of proceedings, subject to consideration being given to maintaining proportionality and the associated management of costs.

13. As part of the Tribunal's active case management, we consider that the parties may be assisted by earlier listing of trial dates. We note that the Commercial Court is often perceived to be a favourable division of the High Court due to its reputation in setting directions to trial at the first CMC (including a provisional listing of the trial dates). We believe this could helpfully be adopted by the Tribunal where possible, on the basis that early visibility over trial dates provides certainty to all parties involved but also helps to ensure that parties are able

[6] For example, the cases in which we are instructed (*1292/5/7/18; 1293/5/7/18; 1294/5/7/18* (noted in footnote 2)) are case-managed together alongside cases *1284/5/7/18*, *1290/5/7/18*, *1291/5/7/18* and *1295/5/7/18*.

[7] Whereby the three proceedings (*Sainsbury's Supermarkets Ltd & Others v. Mastercard Inc. & Others*, *Asda Stores Ltd. & Others v. Mastercard Inc. & Others* and *Sainsbury's Supermarkets Ltd v. Visa Europe Services LLC & Others*) each proceeded to their own first-instance trial and judgment, following which they were combined on appeal to the Court of Appeal and UK Supreme Court, and have since been permitted to proceed individually during the Tribunal remittal proceedings which are on-going. See further cases *1286/5/7/18*, *1287/5/7/18* and *1288/5/7/18*.

to more accurately forecast costs. As the Tribunal becomes busier, early listing will also assist in overcoming difficulties which can be encountered in multi-party cases with counsel availability. Delays to the listing of trial dates may otherwise result in momentum in proceedings being lost, and may also mean that further costs are unnecessarily incurred by the parties.

Civil Procedure Rules

14. Whilst the Guide to Proceedings 2015[8] (the "**Tribunal Guide**") makes clear that the Tribunal Rules are largely modelled on the Civil Procedure Rules ("**CPR**"), there are certain provisions contained within the CPR which are not reflected in the Rules. By way of example, the CPR contain a practice direction on pre-action conduct which applies generally to competition claims in the absence of a specific protocol. There may however be specific considerations which apply particularly to pre-action conduct in competition claims – for example, it may be helpful for the Rules to encourage parties to exchange reasonable requests for documents during the pre-action dialogue (subject however to the immediacy of any limitation deadline), which is important in competition claims given the aforementioned asymmetry of information that exists between claimants and defendants.

Availability of documents

15. The Tribunal currently uploads certain documents to the case pages on its website which can be accessed free of charge by members of the public (such as summaries of claim forms/appeal notices, orders, judgments and hearing transcripts). The publication of hearing transcripts in particular accords with the principle of open justice, and we note that the Tribunal leads by example when compared to other courts in the jurisdiction – such as the High Court – whereby hearing transcripts are only accessible by non-parties at excessive cost from third-party transcription companies. Similarly, whilst orders are accessible from the High Court's CE-File service, this is usually for a nominal fee and with a short processing delay. In many respects therefore, the Tribunal goes beyond what is currently available on the High Court CE-File service and this is welcome.

16. However, to ensure further adherence to the principle of open justice, the Tribunal could consider making non-confidential versions of statements of case publicly accessible. Statements of case in the High Court are currently available through CE-File at a nominal cost and are subject to a short processing delay. Should a non-party wish to access statements of case from the Tribunal, then, pursuant to paragraph 9.66 of the Tribunal Guide, they must approach the relevant party seeking access of the relevant document provided that it was referred to or quoted in open court. In a worst-case, a party may unreasonably refuse access meaning that the non-party must apply to the Tribunal for access. Even if a party were to consent to a request, this is not a sensible use of resources or cost. We do not see

[8] *Guide to Proceedings*, CAT (1 October 2015) – available here. See, in particular, paragraph 3.2.

any reason why (non-confidential) statements of case should not be available on request from the Tribunal.

17. Specifically as regards hearings, we note that the Tribunal has live-streamed hearings since the beginning of the pandemic, and which have been readily accessible to members of the public. We would encourage the continuation of this practice even where hearings resume in-person with hearing transcripts and recordings available via the Tribunal website. Alongside promoting open justice, it is particularly helpful to parties where issues under consideration in one case may be relevant to other cases (for example, where multiple claims have been brought in relation to the same infringement). During the early days of the collective regime, this also assists parties to stay abreast of developments and guidance issued by the Tribunal as to its approach in what is a developing area of the law.

Limitation

18. Unfortunately, the patchwork limitation provisions which apply to claims before the Tribunal have been a significant barrier to a number of good claims being brought. The amendments to the limitation provisions in recent years by the Consumer Rights Act 2015 ("**CRA**"), followed by the implementation of the Damages Directive[9], have resulted in a complex and fragmented framework, which has unfortunately had the effect of thwarting potential claims.

19. In particular, the transitional provisions under the Rules relating to standalone actions have restricted the issuance of standalone actions in the last six years, with the consequence that: (i) many individual damages actions have continued to be issued first in the High Court to the extent claims include any standalone element; and (ii) the use of the new collective regime has been hampered for the purposes of standalone actions, where there is no alternative option to first commence a claim in the High Court. The impact of this rule has been mitigated to some extent over time as the time period for which standalone actions can be brought in the Tribunal will, from 1 October 2021, extend back to six years. However, this still creates an issue where a claimant would ordinarily be able to take advantage of concealment to extend limitation in the High Court, but may not be able to do so in the Tribunal for causes of action which accrued more than two years prior to the introduction of the Rules. Given the time which it may take for a competition infringement to be discovered and investigated, this looks set to remain an issue in the coming years.

20. A claimant may rely upon the concealment suspension provisions in the Limitation Act 1980 in respect of cartel follow-on cases.[10] However, the same cannot necessarily be said in respect of other forms of infringement where the position on whether concealment was deliberate[11] remains uncertain. This means that would-be claimants face a less advantageous position on application of the limitation rules in respect of infringements other

[9] The Claims in respect of Loss or Damage arising from Competition Infringements (Competition Act 1998 and Other Enactments (Amendment)) Regulations 2017 – available here.
[10] See section 32 of the Limitation Act 1980 – available here.
[11] See section 32(1)(b) of the Limitation Act 1980 – available here.

than a secretive cartel. This is exacerbated by the fact that the CRA dispensed with the former rule that a follow-on action may be brought within two years, two months and ten days of the publication of a decision for claims relating to European Commission decisions, or two years and two months for Competition and Markets Authority ("**CMA**") decisions (subject to any appeal proceedings) – and which did not discriminate as between the nature of the infringement[12].

21. Furthermore, as the limitation rules which apply to any given case depend largely upon the temporal scope of the infringement, this also creates situations where multiple different limitation periods might apply to the same infringement. If the applicable limitation rules are those governed by the CRA, then a claimant has a less favourable limitation position than would have been the case before or after the CRA regime, particularly as limitation is arguably not paused for a cause of action accruing between 1 October 2015 and 8 March 2017 during the period of an investigation. This means that limitation for claims where there may be argued to be no concealment continues to run from the date of the infringement. As above, this remains an issue where the period of the competition infringement covers the period from 1 October 2015 to 8 March 2017 or where conduct becomes public prior to October 2013 but where there is not a binding regulatory decision upon which a claimant may rely.

22. A further compounding factor when it comes to limitation is the limited scope of some recent regulatory decisions, such that the operative part of a decision is only in respect of a narrowly defined aspect of the infringement despite the non-operative part of the decision making clear that the conduct was, in actuality, more widespread (as corroborated by evidence held by the relevant authority on the administrative file). Where a regulatory finding is narrowly defined, a claimant may need to pursue a hybrid case, combining follow-on and standalone elements. However, due to the way in which the provisions relating to standalone claims have been amended over time and as set out above, it is often not possible for a claimant to bring the standalone aspect given the restrictions relating to standalone claims in the period before October 2015. This is illustrated by the fate of the *Mobility Scooters*[13] case, where the narrow scope of the operative part of the decision meant that much of the claim could only proceed on a standalone basis – and the implementation of the limitation provisions was such as to mean that the ability to bring a standalone claim prior to October 2015 is severely restricted. This is despite the fact that the CMA's (formerly the Office of Fair Trading) decision evidenced the existence of wider conduct. This position has unfortunately

[12] The rule was encompassed in various sources: (i) the 2003 Tribunal Rules states that a claim for damages must be made within a period of two years from the dates specified in the CA98; (ii) the CA98 states that the relevant dates are the dates on which the ability to appeal expires, (iii) the TFEU and the CA98 state that an appeal against a European Commission or CMA decision must be made within two months of the notification of the decision; and (iv) in relation to appeals against European Commission decisions, Rules of Procedure of the General Court extended the procedural time limit on account of distance by a single period of ten days.

[13] 1257/7/7/16: *Dorothy Gibson v Pride Mobility Products Limited* (relating to infringement decision CE/9578-12 by the Office of Fair Trading – available here).

significantly restricted a number of *bona fide* claims which could otherwise have been pursued on a part follow-on/part-standalone basis and contributed to the slower uptake of the development of the collective regime since the introduction of the Rules than might otherwise have been allowed.

23. To conclude our submissions on limitation:

    a) Whilst we note that the applicable limitation rules are contained in statute, and not in the Rules, we believe it is nevertheless helpful to further highlight this position for the purposes of the review given that it will continue to impact on the viability of future claims.

    b) We would encourage BEIS to consider whether a harmonisation of the limitation position is feasible – in particular as regards the suspensory provisions which mean that limitation does not commence before the conclusion of the competition authority's investigation or (as applicable) the full exhaustion of any appeal proceedings by an addressee. Given the limitation provisions of the Damages Directive will only apply to infringements which commenced on or after 9 March 2017 (including as regards suspension), it will be several years before the full benefits of the Damages Directive will be felt – with the result that there is an unfortunate lacuna between the old Tribunal rules which provided for follow-on actions to be brought on final conclusion of regulatory investigations and the position adopted under the Rules from October 2015 (i.e., the CRA).

Contribution defendants

24. A key issue in relation to a claimant's costs exposure in competition claims, in particular cartel follow-on claims where there are often multiple defendants, is that the claimant may be exposed to the costs of all defendants joined to a claim pursuant to Rule 39. A claimant may elect to sue one or only targeted members of a cartel on the basis that the cartelists are jointly and severally liable for the total losses stemming from the cartel, and that claimant may have only made purchases from one or a sub-group of the cartelists. As things stand, a claimant has no control over the ability of the defendant nevertheless to bring all other cartelists in by way of contribution proceedings. Involving additional defendants in proceedings inevitably increases the costs exposure for a claimant, not just because of the potential for further adverse costs but also because of the additional work that is necessary to interact with the joined defendants.

25. At present, whilst claimants may seek to rely upon the Tribunal to ensure that proceedings are not de-railed by additional defendants (including Rule 39 defendants) taking a multitude of different positions on points of law or procedure in a manner which contributes to delay and significantly increased time and costs, they currently have no specific mechanism to seek to apply for costs capping or costs management in this context. In a claim relating to a cartel which has involved numerous parties, this has the potential to remain a key deterrent and potential bar to access to justice for a claimant who wishes to recover compensation –

notwithstanding that it should be possible to rely upon the principle of joint and several liability of cartelists to avoid this issue (as noted above).

26. The Tribunal could be afforded with discretion to impose cost capping orders on contribution defendants in order to reduce a claimant's exposure at the outset. We understand that a similar principle is used in proceedings in Germany[14], which includes costs capping relative to the value of the claim if several parties are joined to the proceedings and where (as is the position for all litigation in Germany) the value of the claim is also determinative of the fees which may be recovered in the proceedings.[15] In this scenario, the total claim value is used as the base to determine the lawyers' fees for all individual contribution defendants, and is capped based upon the amount of the claim value in the main action. By way of a worked example, if a claimant commences litigation against one defendant for €30 million, and that defendant brings in three contribution defendants, then the lawyers' fees for the three contribution defendants are capped as if they were each being sued for €10 million, so that the claimant is not exposed to additional costs because of the additional defendants which are joined.

Disclosure

27. As regards paragraph 20 of the BEIS Paper, we note that the recent judgment of the Tribunal in *Ryder Limited & Others v MAN SE & Others*[16] contains some key principles which it may be helpful to consider incorporating to the Tribunal Guide. They are as follows:

    a) The establishment of application hearings on a Friday – whereby one member of the relevant Tribunal panel sets aside some Fridays each month to hear specific disclosure applications between the parties (limited to applications which are capable of being dealt with in such a way). This avoids the need for parties to engage in protracted correspondence on discrete issues, and thus reduces cost and ensures efficiency in proceedings. Particularly where there are similar on-going proceedings (such as in *Trucks* or in *Interchange*), this also helps to create precedent without the need for a full hearing/judgment.[17]

    b) The requirement that parties prepare short written statements in response in order to set out their position upfront. Again, this avoids the need for protracted correspondence with parties potentially shifting their position. This also serves as a useful document for the Tribunal so as to make appropriate directions on disclosure and experts, and it helps to narrow down the issues in dispute.[18]

[14] Section 89a(3) of the German *Gesetz gegen Wettbewerbsbeschränkungen* (Act against Restraints of Competition) – available here.
[15] As further set out in the German *Rechtsanwaltsvergütungsgesetz* (Act on the Remuneration of Lawyers) – available here.
[16] [2020] CAT 3 (15 January 2020) (available here).
[17] *Ibid* at paragraphs 50-54.
[18] *Ibid* at paragraph 44.

c) The Tribunal's emphasis that disclosure and quantification should focus on quantitative as opposed to qualitative evidence is helpful. Whilst the need for qualitative disclosure will vary from case to case, it is widely accepted that qualitative disclosure results in increased costs due to wider search parameters and increased responsive documents.[19]

d) Whilst the use of Redfern Schedules generally assists parties in formulating their disclosure requests (and responding to those of the opposing party), and assists the Tribunal in understanding the same, the Tribunal should consider imposing limits on their use to ensure that the Redfern Schedules are not used opportunistically by parties to comment extensively on disclosure requests. Guidance from the Tribunal in this regard would be beneficial as to the nature and length of comments to be provided (without necessarily imposing restrictions as to word or page count).

C. Collective actions

28. This section of our response is focused exclusively on the Rules which apply specifically to collective opt-out and opt-in actions brought in the Tribunal pursuant to section 47B of the Competition Act 1998 ("**CA98**").[20]

29. The comments below are based on our experience to date of filling collective claims under the Rules and the initial stages of proceedings, which, to date, have advanced only to the hearing for a collective proceeding order in the first cases. Due to the delays occasioned by the appeal to the UK Supreme Court in *Merricks*[21], the operation of the Rules beyond this stage have not yet been tested to the extent which might have been anticipated by the fifth anniversary of the Rules. Our comments are accordingly informed by experience to date and anticipating some areas where there may be gaps in the Rules which it may be useful to consider.

Commencing proceedings

30. In our experience, commencing collective proceedings attracts significant upfront costs. The requirements in the Rules that a proposed class representative files a significant number of documents, including expert evidence, for the purposes of their application for a Collective Proceedings Order ("**CPO**") places a relatively high burden on proposed representatives at the outset of proceedings. Following the UK Supreme Court's judgment in *Merricks*, it may

[19] *Ibid* at paragraph 38.

[20] We note that opt-out collective proceedings in the Tribunal were introduced via the CRA and that this regime pertains only to competition claims. In our view, the existing scope of the opt-out regime is too narrow, and it ought to be extended to other areas of law wherein infringements may cause harm to consumers on a mass scale, such as consumer law, particularly where the same conduct may create alternative causes of action.

[21] *Mastercard Incorporated & Others (Appellants) v Walter Hugh Merricks CBE (Respondent)* [2020] UKSC 51 (11 December 2020) (available here).

be beneficial for the Tribunal to provide written guidance on the expert evidence that is required to be filed as part of any CPO application to assist the parties in ensuring that expert input and associated costs are managed appropriately at the certification stage.

31. Attempts to ensure lower costs at this stage in proceedings would also align with the approach of the UK Supreme Court in *Merricks*, wherein it was held that the standard for proposed class representatives to meet is not one which should go to the merits of the proposed claim (save for the possibility of an application by a defendant for strike-out/summary judgment and in the event the Tribunal is to decide between opt-out or opt-in being the appropriate form of proceedings) and certification ought not to be a "mini-trial".[22]

Low value claims

32. The Tribunal has previously acknowledged that the majority of collective cases depend heavily upon third-party funding, stating, by way of example, that *"[T]he regime of collective proceedings introduced into the CA* [Competition Act 1998] *for competition claims by the Consumer Rights Act 2015 is dependent on TPF* [third-party funding] *for its success since there will be few cases where the class members will themselves be able to fund their claims*".[23] However, in our experience, we have encountered cases which have strong merits (a number of which could in principle be pursued on a follow-on basis) but where the claim value, whilst significant, is not high enough to allow for the commercial rate of return which most commercial funders require. This has been exacerbated when coupled with: (i) CMA decisions which are restricted for administrative reasons to one supplier or to a short period of time, notwithstanding that it is made clear in the decision that the infringement was much wider in scope (as was the case in *Mobility Scooters* – see further paragraph 22 above); and (ii) the significant restriction in the periods for which standalone claims were introduced under the transitional arrangements under the Rules.

33. To facilitate effective access to justice in such cases, consideration could be given to whether mechanisms available elsewhere in the Rules could usefully be extended. We explore three of those in the below paragraphs.

Fast-track procedure

34. The fast-track procedure was introduced via the CRA and has thus far seen around eleven cases in which applications were sought, or orders being made, for fast-track designation (in whole or in part). Thus far, only one claim has reached trial and judgment as to liability (the claim having settled before any hearing on quantum).[24]

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[22] *Ibid* at paragraphs 59-60.

[23] *UK Trucks Claim Limited v Fiat Chrysler Automobiles N.V. & Others, and Road Haulage Association Limited v MAN SE & Others* [2019] CAT 26 (28 October 2019) at paragraph 65 (available here).

[24] *1249/5/7/16: Socrates Training Limited v The Law Society of England and Wales*.

35. Fast-track proceedings are not, however, currently available for claims filed pursuant to section 47B CA98. The availability of the fast-track for lower value collective claims may however assist in encouraging such claims to be brought, particularly where the infringement itself has been found by a competition authority (and such a finding being final) and the issues surrounding causation and quantification are capable of being litigated on an expedited basis. In this regard, the UK Supreme Court in *Merricks,* and also in *Interchange*[25], has dealt with questions as to the necessary level of precision of any estimate of damages (including where an analysis of pass-on is required) – opting in favour of a "broad axe" approach. We note that this may also help to ensure greater uptake on the fast-track regime itself which, thus far, has been viewed to be an inappropriate tool to hear cartel follow-on cases; with the Tribunal noting specifically that the fast-track procedure is not an appropriate recourse for such claims.[26]

Cost capping/management

36. The Tribunal might also provide some guidance as to the use of cost capping orders and/or costs budgeting for such cases (similar to the Precedent H procedure in the High Court under CPR PD 3E). This may work in unison with a fast-track allocation and likewise outside of the fast-track. Effective costs management is required in all cases, but particularly those where the costs of bringing the proceedings may be on par with (or in some cases be larger than) the amount that is ultimately awarded by way of damages at trial or in any settlement – as well as cases where there are multiple parties and analogous proceedings.

37. We would repeat paragraphs 24-26 above as regards contributory defendants which would also have the effect of limiting the adverse costs exposure for claimants.

Use of undistributed damages

38. It may be possible to introduce a mechanism whereby the sum of any undistributed damages is used to finance future collective cases. Whilst an opt-out collective case is yet to proceed through to trial and judgment, the position as set out in the statute is that any undistributed damages, once the Tribunal has awarded any costs and expenses associated with the litigation, go to the Access to Justice Foundation ("**AJF**").[27] The AJF is the only body which is specified in statute as a recipient of undistributed damages.

39. Given the difficulties in bringing smaller collective cases as noted above, we would suggest that some of the undistributed damages left over from opt-out collective actions might be reserved to a specified 'fund' for the purposes of enabling cases which would otherwise not

[25] *Sainsbury's Supermarkets Ltd & Others (Respondents) v MasterCard Incorporated & Others (Appellants)* [2020] UKSC 24 (17 June 2020) (available here).
[26] *Breasley Pillows Limited & Ors v Vita Cellular Foams (UK) Limited & Ors* [2016] CAT 8 (7 June 2016) at paragraph 36 (available here).
[27] See section 47C(5) CA98 and paragraph 2 of The Legal Services Act 2007 (Prescribed Charity) Order 2008 – available here.

be commercially viable to be brought. The creation of such a 'fund', administered by an independent body or potentially the AJF, might enable lower value claims of the type referred to above to be brought. This may involve, for example, an application process by which prospective class representatives would need to demonstrate a viable claim but where it has been unable to source an appropriate funding package. Such 'funds' have been long-used in other jurisdictions where collective proceedings are available, for example in Canada (Ontario[28] and Quebec[29]) and Hong Kong[30]. By way of example, in Ontario, a would-be class representative may apply to the fund for financial support in respect of disbursements related to the proposed proceedings.[31]

Undistributed damages

40. We further note that it might be thought appropriate, in opt-out collective claims, for the undistributed damages to be able to be awarded to a body of the class representative's choice by use of the *cy-près* doctrine as used in other jurisdictions[32]. For example, particularly in consumer collective cases, consumers may be given the option to donate any compensation to which they may be entitled to a designated charity of relevance to the claim.

Certification and carriage disputes

41. The Tribunal has, thus far, heard the first 'carriage dispute' in the context of the *Trucks* collective actions[33], where two applications have been made for a Collective Proceedings Order relating to the same or similar proposed actions. It is also due to hear a further carriage dispute in respect of the *Forex* collective actions in July 2021.[34]

42. The Rules do not currently include a provision as to how a carriage dispute should be managed, nor the principles on which it will be considered by the Tribunal. We believe it may be beneficial for the Rules or Tribunal Guide to contain some explanation of the approach which will be taken by the Tribunal in relation to carriage disputes in collective claims, which may help to save the resources of the parties and Tribunal alike.

Limitation

43. Our general comments on limitation are included at paragraphs 18-23. As we have made clear above, one of the concerns for claimants is that they may be in a position – as a result

[28] Class Proceedings Fund, The Law Foundation of Ontario – additional information available here.
[29] Collective Action Fund, Fonds d'aide aux actions collectives – additional information available here.
[30] Consumer Legal Action Fund, Consumer Council – additional information available here.
[31] *Supra* footnote 28.
[32] Such as is the case in Canada.
[33] Cases *1289/7/7/18* and *1282/7/7/18*, previously noted at footnote 5.
[34] Cases *1336/7/7/19* (previously noted at footnote 3) and *1329/7/7/19: Michael O'Higgins FX Class Representative Limited v Barclays Bank PLC & Others*.

of the changes in the limitation rules over time – where limitation will not be suspended for some or all of the claim period whilst a regulatory investigation or appeal is on-going.

44. In the context of collective actions, there is no mechanism by which a proposed class representative may seek to suspend limitation on behalf of the class in a cost-effective manner. Standstill agreements are commonly used between claimants and defendants in competition claims but are not capable of being entered into in collective proceedings since – at the point of entering a standstill – the proposed class representative is not authorised to represent a given class of persons.

45. This difficulty arises in particular due to some of the problems encountered in relation to the application of the limitation rules on a given infringement – as already canvassed above. For example, where an infringement spans different limitation rules, time may be suspended for some of the infringement period where there is an on-going regulatory investigation or appeal, but not other elements of it (i.e., where the relevant limitation rules do not provide for a suspensory mechanism).

46. As things currently stand, a proposed class representative may not have the option of awaiting the outcome of a regulatory investigation or appeal without risk of losing part of the claim. The only option available in this situation to protect the claim may be to file an application for a CPO. However, this is unattractive in circumstances where there is no way of reducing the significant upfront work required to issue the CPO application. Given the challenges of the limitation rules, we think it would be helpful to have a mechanism or some guidance around the way in which action could be taken by proposed class representatives to issue and stay collective proceedings where required for limitation purposes, and whilst they await the outcome of on-going investigations or appeals under a more streamlined approach – or potentially by agreement *inter partes* with a proposed defendant.

D. Concluding remarks

47. We are grateful for the opportunity to input on the review of the Rules and hope that our responses are of assistance to BEIS in considering any amendments to be made to the Rules. If it would be of assistance to BEIS to discuss any of the points identified, we would be very happy to do so.

Hausfeld & Co. LLP
10 May 2021