COMPETITION LAW UPDATE

Commission Releases White Paper on Damages Actions for Breach of EC Antitrust Rules

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On April 2, 2008 the Commission published its long-anticipated White Paper on damages actions for breach of the EC antitrust rules (the "White Paper"). The White Paper is a modest 10-page document that summarises the Commission's proposals to address perceived obstacles to the development of private antitrust damages litigation in Europe. It is accompanied by detailed supporting documents, including a Staff Working Paper,[1] which summarises much of the reasoning underlying the White Paper's recommendations, and an Impact Assessment,[2] which analyses the benefits and costs of various policy options that were considered in developing the White Paper.

The White Paper aims "*to improve the legal conditions for victims to exercise their right under the Treaty to reparation of all damage suffered as a result of a breach of the EC antitrust rules*" by setting out concrete measures aimed at creating an effective private enforcement system in Europe.[3] Despite the requirement that Member States establish an effective legal framework making exercising the right to damages a realistic possibility, the White Paper emphasises that significant legal and procedural hurdles in national civil litigation systems remain. The Impact Assessment concludes that victims of EC antitrust infringements rarely obtain compensation and are foregoing tens of billions of euros per year in compensation that is rightfully theirs.[4] Toward this end, the

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1 Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules, Brussels, 2.4.2008 SEC(2008) 404, ("Working Paper").

2 Commission Staff Working Document accompanying document to the White Paper on Damages actions for breach of the EC antitrust rules Impact Assessment Brussels, 2.4.2008 SEC(2008) 405 ("Impact Assessment"). The Impact Assessment is based in significant part on findings set forth in a 671-page Impact Study prepared by a team of external consultants: "*Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios*," final report submitted to the Commission on 21 December 2007 ("Impact Study").

3 White Paper, Section 1.2.

4 Impact Assessment, Section 2.2.

White Paper proposes several measures and policy choices intended to facilitate private antitrust claims.

At the same time, the White Paper is careful to emphasise the need to preserve a "*genuinely European approach*" to the issue of damages actions that is "*rooted in European legal culture and traditions*."[5] It had been speculated that, following the Commission's 2005 Green Paper on damages actions,[6] which set forth a wide range of options for discussion, the White Paper might include ambitious measures that would foster "U.S.-style" litigation, such as multiple damages, opt-out class actions, or extensive discovery rules. By and large, however, the Commission has not proposed measures contemplated in the Green Paper that would have been viewed as most dramatic or controversial; the White Paper's recommendations fall largely within the scope of existing European civil law practice and principle.

The main proposals set forth in the White Paper are summarised below.

I. ISSUES OF STANDING AND PROCEDURE

A. STANDING: WHO CAN BRING A CLAIM?

The European Court of Justice in the landmark *Crehan* judgment articulated a broad standard of who has the right to bring a private action for violations of EC competition law, holding that the full effectiveness of EC competition law "*would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.*"[7] The White Paper follows this, proposing a similarly broad approach to the issue of standing.

First, the White Paper advocates granting standing to ***indirect purchasers*** (*i.e.*, purchasers who had no direct dealings with the infringer, but who nonetheless may have suffered harm because an illegal overcharge was passed on to them along the distribution chain). Taking a different position (as is done, for example, in the U.S. Federal Courts,

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5 White Paper, Section 1.2.

6 Commission Green Paper - Damages actions for breach of the EC antitrust rules {SEC(2005) 1732}, ("Green Paper").

7 Case C-453/99, Courage v Crehan, [2001] ECR I-6314 ("*Crehan*"), ¶ 26 (emphasis added). *See also* Joined Cases C-295/04 to C-298/04 *Vincenzo Manfredi & Ors v. Lloyd Adriatico Assicurazioni SpA & Ors* [2006] ECR I-6619 ("*Manfredi*"), ¶ 61 ("any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC").

which deny standing to indirect purchasers) would have been difficult in view of the Court's holdings in *Crehan* and *Manfredi*.

Second, the White Paper proposes measures to foster ***collective actions*** by or on behalf of individuals who have each suffered relatively low-level damage (but which may in aggregate be substantial). Such claims often remain uncompensated, as individual claimants lack sufficient incentive to seek damages and existing procedural inefficiencies often render collective actions impractical. The White Paper proposes two complementary measures to facilitate collective redress:

- *representative actions brought by qualified entities*, such as consumer associations, state bodies, or trade associations, on behalf of identified or, in some limited cases, identifiable victims. These entities would be either (i) officially designated in advance or (ii) certified on an *ad hoc* basis by a Member State for a particular antitrust infringement to bring an action on behalf of some or all of their members; and

- *opt-in collective actions*, in which victims expressly decide to combine their individual claims for damages suffered into one single action.

Both of these types of actions have already been applied at the Member State level, and neither proposal is likely to be seen as controversial. The White Paper does not propose introducing U.S.-style "opt-out" class actions. In the United States, collective antitrust claims are brought primarily through "opt-out" class actions, in which a single plaintiff is able to commence an action on behalf of an entire class of unnamed plaintiffs (thus requiring those who do not wish to participate in the action to opt out). The opt-out class action process has been widely regarded in Europe as one of the principal "excesses" of the U.S. system. In fact, in 2007 Commissioner Kroes had stated expressly that she would not support the introduction of opt-out class actions in Europe,[8] so the White Paper's position is unsurprising.[9]

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[8] Commissioner Neelie Kroes, "Reinforcing the fight against cartels and developing private antitrust damage actions: two tools for a more competitive Europe," Speech/07/128, March 8, 2007.

[9] By contrast, the UK Office of Fair Trading recently advocated a more aggressive approach, proposing to introduce the possibility of opt-out representative actions for damages on behalf of consumers/businesses at large (as opposed to the current opt-in procedure on behalf of named consumers). *Private Actions in Competition Law: effective redress for consumers and businesses*, Recommendations from the Office of Fair Trading, OFT916resp, November 2007.

B. COSTS AND FUNDING CLAIMS

Litigation is expensive. The costs of bringing an action for damages can represent a serious barrier to seeking redress, in particular for final consumers. Competition cases tend to be complex, resulting in high legal fees. Civil litigation in EU Member States generally operates on a "loser pays" principle designed to discourage unmeritorious claims (and defences) by requiring the losing party to pay its own costs as well as a proportion (*e.g.*, in the U.K., normally around 60%) of the costs of its adversary. This works to deflate legal costs for successful private plaintiffs. However, it also creates risk, as due to the inherent uncertainty in bringing a lawsuit, a plaintiff will always expose itself to the risk of losing the case and having to pay not only its own legal costs but also the defendant's.

The Green Paper had posed for consideration a number of options that would potentially have alleviated cost burdens on plaintiffs, including "cost-capping" (*i.e.*, exempting unsuccessful plaintiffs from paying some or all of the defendant's legal costs, save where actions have been introduced in a "manifestly unreasonable manner") and the introduction of contingency fees (*i.e.*, arrangements in which no fee is charged by the plaintiff's lawyers unless the claim is successful, in which case the legal fee is often expressed as a percentage of the damages awarded).

However, the White Paper takes a conservative approach and does not suggest any specific changes to national cost regimes in favour of claimants. It merely encourages Member States "to reflect on their cost rules so as to facilitate meritorious litigation, taking into consideration existing practices."[10] Appropriate measures could include:

- encouraging settlements as a way to reduce costs;
- setting court fees at a level where they do not become a disproportionate disincentive to antitrust damages claims; and
- giving national courts discretionary "cost-capping" authority (*i.e.*, the possibility of issuing cost orders derogating, in justified cases, from the normal "loser pays" cost rules).[11]

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10 Working Paper, ¶ 245.

11 White Paper, Section 2.8.

C. LIMITATION PERIODS

The White Paper observes that limitation periods, while providing legal certainty, can also be a significant obstacle to the recovery of antitrust damages. For example, a short limitation period that started to run upon termination of the (possibly covert) infringement could time-bar follow-on actions in the wake of an infringement decision by a regulator or an initial successful test case, as the period could expire while public enforcement remained ongoing.

Member State rules on limitation periods vary substantially. The White Paper makes two suggestions toward harmonisation of limitation periods:

- First, in the case of a continuous or repeated infringement, the limitation period should not start to run before the day on which the infringement ceases or before the victim of the infringement can reasonably be expected to have become aware of the infringement and of the harm it caused him; and

- Second, Member States should remain free to set their own limitation periods with reference to stand-alone actions, but in case of follow-on actions, a *new limitation period* of at least two years should start once the infringement decision on which a follow-on claimant relies has become final.

II. ISSUES OF EVIDENCE AND PROOF

A. DISCLOSURE/DISCOVERY

The majority of Member States follow the civil law tradition, which does not embrace the concept of disclosure of documents between the parties in civil litigation. While the courts retain powers to order production of documents, the parties' ability to compel production of documents is limited. Lack of access to evidence in these jurisdictions substantially impairs the claimant's ability to prove an infringement in a stand-alone action. Without the benefit of the resources and investigatory powers of a competition authority, claimants must avail themselves of the possibilities offered by national discovery rules, many of which effectively require the claimant to have sufficient evidence to discharge the burden of proof even before launching an action.

The White Paper follows proposals first tabled in the Green Paper, suggesting that Member States adopt special rules expanding the possibilities for claimants to obtain documentary evidence from third parties in EC competition-law actions for damages. In particular, the Commission proposes granting national courts the power to order parties to proceedings (or third parties) to disclose precise categories of relevant evidence, provided that the plaintiff:

- has presented all the facts and provided evidence reasonably available to him and that, from these, there are plausible grounds to suspect that he has suffered harm from an antitrust infringement committed by the defendant;

- has shown that, despite all efforts, without the discovery order, he would not be able to produce the requested evidence;

- has specified sufficiently precise categories of evidence to be disclosed; and

- has satisfied the Court that the evidence requested is both relevant to the case and necessary and proportionate.

The White Paper states that such a "fact-pleading" disclosure regime, under strict judicial control, would assist in overcoming the inherent information asymmetry that disadvantages plaintiffs, while still preventing so-called "fishing expeditions"[12] and "discovery blackmail."[13]

The White Paper recommends further that national courts should be granted powers to impose sufficient sanctions to deter the destruction of relevant evidence or refusal to comply with a discovery order. It also highlights the importance of granting adequate protection from discovery to corporate statements by leniency applicants[14] and to the investigations of competition authorities.

B. PRECEDENTIAL VALUE OF PRIOR COMPETITION AUTHORITY DECISIONS

In a follow-on action for damages, the burden of proving an infringement is substantially alleviated since the claimant can take advantage of the already-existing competition authority decision finding an infringement. In actions following on from prior European Commission infringement decisions, the precedential value of the

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12 *I.e., "a strategy to elicit in an unfocused manner, through very broad discovery requests, information from another party in the hope that some relevant evidence for a damages claim might be found.*" Working Paper, fn. 39.

13 *I.e., "a strategy to request very broad discovery measures entailing high costs with the intention to compel the other party to settle rather than to continue the litigation, although the claim or the defence may be rather weak or even unmeritorious.*" Working Paper, fn. 40.

14 The White Paper recommends that all corporate statements submitted by a leniency applicant under Article 81, regardless of whether the application for leniency is accepted, is rejected, or leads to no decision by the competition authority, should be protected from disclosure. In a related point, the White Paper proposes for further consideration a rule whereby the immunity recipient's civil liability would be limited to claims by his direct and indirect contractual partners. White Paper, Section 2.9.

decision is clear: Commission decisions are binding on national courts as to the existence of an infringement. According to Article 16 of Regulation 1/2003, in order to avoid the risk of conflicting decisions, national courts "cannot take decisions running counter to the decision adopted by the Commission."[15]

Due in part to a lack of precedent, however, the situation in respect of actions following on from infringement decisions by national competition authorities ("NCAs") is slightly less clear. The White Paper aims to clarify this issue by extending to infringement decisions by NCAs that are members of the European Competition Network the same precedential value that is accorded to Commission decisions. The Commission thus proposes that final infringement decisions taken by an NCA under Article 81 or 82, and final judgments by review courts upholding those decisions, should be accepted in every Member State as irrebuttable proof of the infringement in subsequent actions for damages.[16]

The proposed rule would apply only to NCA decisions that are final, *i.e.*, where the defendant has exhausted all appeal avenues, and that relate to *the same practices and same undertaking(s*) concerned in the follow-on litigation. This raises the question whether decisions dealing with facts that are merely similar to those at issue before a court should also be binding. The Working Paper clarifies that binding effect should only be granted to decisions relating to *"(i) the same agreements, decisions or practices that the NCA found to infringe Article 81 or Article 82 EC, and (ii) to the same individuals, companies or groups of companies which the NCA found to have committed this infringement (normally, the addressee(s) of the decision).*"[17] Therefore, while a prior infringement decision in a similar case may be admitted as evidence, and may even be highly persuasive, it will not constitute binding proof of the infringement and the court will need to reach its own determination on that issue.[18]

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15 Recital 22 and Article 16(1) of Regulation 1/2003. *See also* Case C-344-98 *Masterfoods Ltd. v. HB Ice Cream Ltd* ("*Masterfoods*").

16 White Paper, Section 2.3.

17 Working Paper, ¶ 154.

18 This is consistent with the view taken by the U.K. House of Lords, which considered this issue in the *Crehan* case, *Inntrepreneur Pub Company and others v. Crehan* [2006] UKHL 38. The House of Lords held that claimants will not be entitled to "piggy back" a private damages action on a prior competition authority infringement decision where the prior decision deals with a different – even if very similar – situation. The House of Lords explained that while it is clear that conflicting decisions must be avoided (citing *Delimitis*, Case C-234-89 *Delimitis v. Henninger Bräu AG*, and other precedents), there is no risk of such conflict where the legal and factual context of the case that was

C. FAULT REQUIREMENT

The White Paper observes that once a breach of Article 81 or 82 has been proven, Member States take different approaches concerning the extent to which the claimant must also prove the element of fault to obtain damages. The White Paper endorses the approach of those Member States that either require no showing of fault or irrebuttably presume fault once an infringement has been proven. For other Member States, the White Paper states that the principle of effectiveness requires that any limitations imposed by a fault requirement would have to be limited. The White Paper thus suggests that, for Member States that require fault to be proven:

- first, once the infringement of Article 81 and 82 has been proven, the defendant should be liable for damages caused unless he demonstrates that the infringement was the result of a genuinely excusable error; and

- second, an error would be deemed excusable if "a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition."[19]

These proposals would, in practice, create a strong presumption of fault once the infringement is proven.

III. ISSUES OF DAMAGES

A. DAMAGES: DEFINITION AND QUANTIFICATION

According to the ECJ's judgment in *Manfredi*, each Member State may choose how best to provide for the compensation of damages, provided that (i) the domestic rules do not discriminate against damage claims for breach of EC competition rules, as compared with claims under national rules (the principle of equivalence) and (ii) the domestic rules do not render the exercise of the right to damages excessively difficult (the principle of effectiveness). According to the Court, the principle of effectiveness requires Member States to allow claimants the potential to claim compensation for actual loss, lost profit, and interest caused by the infringement of EC competition law,[20] but issues such as punitive damages and restitution are left to the Member States (subject to the principle of equivalence).

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examined by the Commission is not completely identical to that before the national court (citing the Opinion of Advocate General Cosmas in *Masterfoods).*

19 White Paper, Section 2.4.

20 *Manfredi*, ¶¶ 95, 97.

The White Paper suggests that the rules set forth in *Manfredi* should be codified in a Community legislative instrument, but does not propose expanding the types of recoverable damages beyond the compensatory principle, which is already the basis for damages calculation in most Member States. Other options raised in the Green Paper – most notably, punitive double damages for horizontal cartels – have not been proposed.

Compensatory damages are usually calculated as the difference between the claimant's actual position and the hypothetical position that the claimant would have been in but for the unlawful conduct. Quantifying this can be difficult, since reconstructing the counterfactual "but for" scenario typically requires making key economic assumptions, small changes to which can have significant effects on the outcome. In recognition of this difficulty, the White Paper announces that, to facilitate the calculation of damages, the Commission intends to issue non-binding guidelines for quantification of damages in antitrust cases, including simplified rules on estimating the loss suffered as a result of the infringement.

B. THE PASSING-ON DEFENCE

The "passing-on defence" arises out of the compensatory principle of damages. In jurisdictions that allow the defence to be raised, defendants can argue that their direct customers should not be entitled to claim the full amount of damages to which they would otherwise be entitled (usually measured as the amount of overcharge attributable to a cartel or abusive pricing scheme) if they have passed the higher price through to their own customers downstream. The standing of indirect purchasers is linked directly to this issue, since if the overcharge has been passed on by the direct purchaser, indirect purchasers (the direct purchaser's customers) become the primary injured parties.

There are sound policy arguments favouring various different approaches to these issues. The compensatory principle of damages counsels in favour of allowing defendants to raise the passing-on defence, since a claimant that passed overcharge through to its own customers would be unjustly enriched if its damage award was not reduced correspondingly. This principle also supports allowing indirect purchasers (who may be the real injured parties) to sue. On the other hand, the passing-on defence inevitably increases the complexity of litigation because it creates the need to analyse the distribution of an overcharge along the entire supply chain of the relevant product in order to determine damages. Moreover, allowing the passing-on defence will make it more difficult for direct purchasers – precisely those who are most likely to have the greatest incentive and ability to bring private actions – to obtain antitrust damages, likely decreasing the overall level of private enforcement.

The Green Paper invited comment on several options: (1) allowing the passing-on defence, with both direct and indirect purchasers entitled to sue; (2) excluding the passing-on defence, with only direct purchasers able to sue (*i.e.*, the approach in the U.S. federal courts); (3) excluding the passing-on defence, with both direct and indirect purchasers able to sue (*i.e.*, the *de facto* approach in the U.S. federal + state court system); and (4) the introduction of a two-step procedure under which in the initial procedure the passing-on defence is excluded and the defendant is sued for the total overcharge, and in later proceedings the damages are allocated among all parties (including direct and indirect purchasers) that suffered a loss.[21] The Commission recognises that given the complexity of these issues, a trade-off between justice (in the sense of full recovery for all those who have suffered a loss from an illegal practice) and efficiency is inevitable.

The White Paper proposes a course grounded in the compensatory principle of damages, based on option (1). As explained above, the Commission proposes to grant standing to indirect purchasers. The Commission also proposes to allow defendants to raise the passing-on defence. At the same time, however, the Commission proposes to lighten the burden of proof for indirect purchasers by granting them a rebuttable presumption that the illegal overcharge was passed on to them in its entirety. The burden would then shift to the defendant to show that overcharge was not, or was only partially, passed on to the claimant. This approach reduces the possibilities that direct purchasers who have passed on overcharge may be unjustly enriched and that defendants may be required to pay twice for the same harm, while also recognising and seeking to address in part the difficulties of proof that indirect purchasers commonly face.

IV. NEXT STEPS

The White Paper does not set forth binding rules, but has been issued for public comment. The Commission does not indicate what the next step in its effort to promote private actions will be, but one logical possibility would be seeking to pass a Regulation, which would require support of the European Parliament and Council. The Parliament has already indicated its support in principle, having issued a Resolution in 2007 calling for the adoption of common measures at the EU level "to facilitate the bringing of 'stand alone' and 'follow on' private actions claiming damages for behaviour in breach of the Community competition rules."[22] In the meantime, the White Paper may already provide guidance to national judges who are asked to decide on an action for damages under Article 81 or 82 EC.

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21 Green Paper, p. 8.

22 European Parliament resolution of 25 April 2007 on the Green Paper on Damages actions for breach of the EC antitrust rules - 2006/2207(INI).

The Commission is welcoming comments on the White Paper until July 15, 2008.

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