

## EU Competition Briefing - May 2008

### A Periodic Report from Steptoe & Johnson LLP

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#### Class Actions or Collective Redress?

#### Antitrust damages actions in Europe: A glimpse into the future

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#### Introduction

The Commission's eagerly awaited White Paper on "Damages Actions for Breach of EC Antitrust Rules" was published in April. It followed a period of active debate and speculation on the possible introduction of class actions in Europe that commenced with the publication of the Commission's Green Paper in 2005.

The Green Paper was significant in signalling the European antitrust watchdog's determination to actively promote private damages actions but, also, ignited the debate on the potential for importing class actions in Europe. The debate gained further momentum when the Commission later announced that it was considering the introduction of collective redress mechanisms in other areas of consumer legislation.<sup>1</sup>

Competition law is probably the most suitable forum for this debate in the shorter term. This is not only due to the de facto head-start on this issue of the Commission's Directorate General of Competition. The popularity of such actions in the competition field is facilitated by the possibility of bringing "follow-on" proceedings. In other words, court actions that are based on enforcement Decisions of the European Commission or the Member States' competition authorities.

The White Paper provides a clearer indication of the Commission's policy objectives in relation to private damages actions and, by the same token, collective redress. This Briefing examines the key aspects of the Commission's proposed approach.

#### Issues covered in the White Paper

The White Paper contains proposals to improve the effectiveness of the Member States' redress mechanisms for the victims of antitrust infringements, in particular, in relation to:

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- collective redress;
- access to evidence;
- decisions of the national competition authorities;
- fault requirements;
- damages;
- passing-on overcharges;
- limitation periods;
- costs; and
- interaction of private actions for damages with leniency programmes.

The Commission's aim is to guarantee full compensation for damages in a way that supplements public enforcement mechanisms. It also clarifies that its intention is to foster a genuinely European approach based on "... balanced measures that are rooted in European legal culture and traditions".

### Collective redress

In order to ensure that all those that have suffered harm, however small, receive full compensation, the Commission proposes the possibility of aggregating claims in either of two ways:

- representative actions brought by trade or consumer associations, or other state bodies, on behalf of identified victims or classes of victims; or
- opt-in collective actions, where the victims combine their claims into a single action.

Both types of actions should be available and must be designed to complement each other.

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As mentioned earlier, the Commission makes it clear that the collective redress that it envisages will be based on a genuinely European approach. The European Court of Justice has already laid the cornerstone of this approach by confirming that any individual that has suffered harm, including indirect purchasers, have the right to claim damages before national courts in Europe.

Nevertheless, by enabling representative actions brought by associations and state bodies, the Commission's proposal may be seen as bearing a resemblance to the US style opt-out class actions. It is not clear, however, how such representative actions would actually serve to compensate individual victims.

### Access to evidence

The White Paper proposes an EU-wide minimum level of disclosure of evidence under which national courts will have the power to order the disclosure of precise categories of relevant evidence. In order to prevent abuse, before such an order is issued, claimants must show that:

- there are plausible grounds<sup>2</sup> to suspect that they have suffered harm as a result of an infringement by the defendant;
- they have presented all the evidence reasonably available to them;
- they are unable to produce the required evidence in any other way; and
- the envisaged disclosure is relevant, necessary and proportionate.

Refusal to disclose should entail appropriate sanctions including the possibility for the court to draw adverse inferences when deciding the case before it. However, while the Commission specifies that claimants should be given the right to request only precise categories of relevant evidence, it is arguable that the safeguards envisaged in the White Paper are not sufficient for precluding fishing expeditions. This is because the term "category" may in certain circumstances be interpreted very broadly.

Moreover, the White Paper fails to address the issue of privileged documents. The rules on privilege in the various Member States are not harmonised. These differences will inevitably result in forum shopping in favour of Member States where protection standards against disclosure are lower.

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### Decisions of the national competition authorities and courts

The final decisions of national competition authorities or courts must be binding to any national court that has to rule in actions for damages that relate to the same practices and undertakings. A decision will only be considered to be final where the defendant has exhausted all avenues for appeal.

This measure would be a real test for the solidity of the European Competition Network and the extent of the various Member States' courts faith in their partners' legal systems, as it is not yet clear that the EU is ready to embark in mutual recognition of administrative and judicial decisions. In any event, such efforts in the competition field may well have knock on effects on the Member States' approach to further consolidation and harmonisation in the area of justice, the EU's third pillar.

### Fault requirements

The civil liability rules of some Member States require the existence of fault attributable to the defendant in order to award damages. In these cases, the White Paper suggests that the infringers should always be found liable unless they can demonstrate that the infringement was the result of a genuinely excusable error. A genuinely excusable error should only exist when a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition.

While this proposal appears reasonable in cases of hard-core and obvious infringements, the adoption of a strict liability standard in damages claims may encourage the production of unjustifiably harsh findings in less clear-cut cases. This is especially true in the case of infringements of Article 82 of the EC Treaty, which prohibits the abuse of a dominant position. The application of Article 82 is, by many, considered a contentious area because there are no clear bright line tests for finding that an undertaking abused market power. The system of self-assessment and the rejection of any possibility to notify borderline cases, in conjunction with strict liability in damages claims would, inevitably, be bad news for dominant companies.

### Damages

The Commission proposes the codification of EC jurisprudence on the scope of damages that can be recovered by victims of antitrust violations, including actual loss, loss of profit and interest. It also intends to produce guidance for the

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quantification of such damages by means of, e.g., approximate methods of calculation or simplified rules on estimating loss.

However, there are no proposals for the introduction of punitive damages. The White Paper discusses damages that would fully compensate the claimant for any harm incurred but is clearly not suggesting the import of a system of double or treble damages as that in force in the US. Punitive damages would, nevertheless, be available for EC law infringements where they are available for national competition law infringements.

### Passing-on overcharges

The White Paper clarifies that defendants should be entitled to invoke the “passing-on defence” against a claimant that has passed the illegal overcharge to its customers and has, therefore, suffered no actual harm. At the same time, however, in cases brought by indirect purchasers, the courts should also be able to presume that the illegal overcharge was passed on to indirect purchasers in its entirety unless the defendant proves otherwise.

This is another important difference between the US system and that envisaged by the Commission. In this respect, even though the White Paper offers a presumption of such pass on to indirect purchasers, the burden of proving it rests with the defendant. It is not difficult to see why the Commission has decided to back this pass-on mechanism as it furthers its goal of enabling more private damages actions considerably. However, the combined effect of these rules may place an unfairly heavy burden on defendants, especially bearing in mind that illegal overcharges are rarely, if ever, passed on in their entirety to indirect customers and the evidence necessary to rebut the passing on presumption will, in most cases, not be in the hands of the defendant.

### Limitation periods

The Commission suggests that the limitation periods for damages actions arising from competition law offences should not start to run before the day on which a continuous or repeated infringement ceases, or before the victim can reasonably be expected to have knowledge of the infringement and the harm it caused. In addition, a new limitation period should be applicable for all follow-on actions of at least two years from the time that the infringement decision by a competition authority has become final.

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As regards the duration of limitation periods, under the general EC law principle of effectiveness, such periods must not make antitrust damages actions practically impossible or excessively difficult.

### Costs

As regards costs, the White Paper encourages Member States to promote settlements mechanisms and set court fees at levels that are not unjustifiably burdensome. Moreover, courts must be given the opportunity to derogate from the 'loser pays all' costs orders so as to ensure that even unsuccessful claimants will not have to bear any unreasonable or excessive costs incurred by the defendant.

This proposal seems to water-down one of the main obstacles to the advancement of a more litigious culture in Europe. However, the precise parameters of the scheme are not clear. There is a fine line between encouraging claimants and interfering with the defendants' rights of defence. In this respect, the 'loser pays all' system is at the heart of shielding defendants against sham or vexatious litigation.

### The interaction of private actions for damages with leniency

The White Paper suggests that all corporate statements submitted by leniency applicants, regardless of whether they were successful, should be protected against disclosure in private actions for damages. This protection must be afforded irrespective of the existence of a decision by the competition authority at the time of the court order for disclosure. Voluntary disclosure of corporate statements should also be precluded until a Statement of Objections has been issued by the authority.

The Commission also puts forward for further consideration the idea of making the immunity recipient only liable to claims instituted by its "direct and indirect contractual partners". The immunity recipient would be responsible for proving the limitations of such liability.

Despite the possibility that these suggestions may interfere with the principle of full compensation, it is important that such privileges, including the limitation of the immunity recipient's civil liability, are available. This is because the very success of the European competition authorities' leniency system heavily depends on such measures being taken.

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### Appraisal of the White Paper

The White Paper appears to be a more subdued document to the earlier Green Paper. It contains a number of important proposals that will go a long way with promoting the Commission's policy objective of encouraging private damages actions for breach of the EC antitrust rules. However, it will not, by any means, cause the overhaul of the national judicial systems as was originally feared. This is perhaps the result of the Commission's unwillingness to interfere with Member States' civil law systems.

It may also be due to the Commission's inability to explain why competition claims should deserve a special judicial treatment compared to other types of claims for damages such as, for example, claims for damages in personal injury cases. In this regard, it will be interesting to see whether the proposals of the Commissioner for Consumer Protection go any further.

Nevertheless, the Commission seems determined to stand by its commitment to foster private enforcement in Europe by any means necessary. It has recently taken the unorthodox step of announcing that it filed a claim for damages on its own behalf against the members of the "elevators and escalators cartel"<sup>3</sup>. The Commission had produced a Decision fining the companies involved €92 million in February 2007 and will now be taking action as a private claimant against the same companies based on that Decision. The case raises a lot of questions regarding the Commission's role as prosecutor, judge and private claimant; but, at the same time, sends a strong signal about its commitment to foster damages claims in Europe.

While the Commission has not yet taken a definitive view on the legislative action it will take following the White Paper, it has indicated that its aims will likely be better achieved by a combination of measures at EU and national level. However, it has reserved its final decision until it has analysed stakeholders' responses to the White Paper.

### Will Europe be the next US?

In addition to the main differences described above between the US and the system envisaged by the Commission in its White Paper, we should also note the conspicuous absence of any mention of contingency fees in the Commission's proposals.

The term "contingency fees" refers to the method of remunerating the claimant's lawyer by way of a percentage of the monies received as a result of a successful

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litigation or settlement. They are seen as one of the main reasons behind the existence of a lawyer-led litigation culture in the US and an important contributor to what is seen as the “excesses of the US system”.

Even though the Commission’s Green Paper did not make mention of contingency fees, some of the contributors to the consultation that followed commented both in favour and against their adoption. Nevertheless, the Commission continued to avoid any mention of the subject in the White Paper, leaving it to individual Member States to decide whether it would constitute a plausible and desirable element of their legal systems. According to a comparative study carried out for the Commission before the adoption of the Green Paper, contingency fees are allowed in 8 of the 25 Member States under examination.<sup>4</sup>

### How is this all relevant to you?

Private damages actions are of relevance to all companies with operations in Europe. While collective redress is mostly of interest to those who find themselves on the defendant’s bench, damages actions are also of direct relevance to companies that find themselves out of pocket as a result of their competitors’ anti-competitive behaviour. Many will find that they fit just as well in both categories. Private enforcement should not, therefore, be seen only as an unavoidable evil but, also, as an opportunity.

### What to do now?

The European Commission intends to avoid the excesses of the US class-actions system. This is a welcome goal and private companies should endeavour to support the authority in achieving it.

Companies’ awareness of the possibility of private damages claims when they are the victims of their competitors’ antitrust violations is of equal importance. They must be alert to the fact that, not only they are not helpless in such instances, but they could even be compensated for losses. The changes proposed by the White Paper aim to facilitate such actions. Companies should encourage them.

A White Paper is usually the last consultation document before draft legislation is proposed. The one discussed here is open to public consultation until 15 July 2008. Companies interested in providing their views to the Commission must do so before the expiry of this deadline.

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1. Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee, "EU Consumer Policy Strategy 2007–2013", 13 March 2007.
2. It remains to be seen whether the plausibility requirement proposed by the Commission here is akin to the standard set by the US Supreme Court in *Bell Atlantic Corp. et. Al. v Twombly et. al.*, No. 05–1126.
3. "Commission goes to court over damages suffered from elevators cartel"; IP/08/998; 24 June 2008.
4. Study on the Condition of Claims for Damages in Case of Infringements of Competition Rules, Comparative Report; D. Waelbroeck, D. Slater, G. Even–Shoshan; 31 August 2004

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