INFORMATIVE NOTE

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WHITE PAPER ON DAMAGES ACTIONS FOR BREACH OF THE EU ANTITRUST RULES

Antitrust rules are provided for by Articles 81 and 82 of the EC Treaty, which ban restrictive business practices and abuses of dominant positions. These articles are applied both by the European Commission and by the national competition authorities. The mentioned provisions may also be applied by the national courts in civil disputes, through which the agreements or decisions can be declared void, injunctive relief can be obtained, and compensation can be awarded to those who have suffered a loss caused by an infringement of the antitrust rules. The full application of EU law requires an effective system in what regards actions for damages for breach of antitrust rules, this having already been confirmed by the European Court of Justice[1]. In the absence of Community rules governing the matter, it should be for the domestic legal system of each Member State to lay down adequate procedural rules governing the filing, treatment and decision of actions for damages. Such actions are, nonetheless, still rare.

On 19 December 2005, the European Commission adopted the Green Paper on damages actions for breach of the EU antitrust rules[2]. In that paper the Commission identified the main obstacles to an efficient system of actions for damages and set out different options for further reflection and possible action to improve damages actions.

In the path of the discussion on the questions raised in the Green Paper, the European Commission published, on 3 April 2008, the White Book on the same matter[3], where it lays down concrete proposals on several points, intended to eliminate the previously detected obstacles to the actions for damages' effectiveness.

In what regards **standing,** the White Paper states that any person shall have the right to bring judicial proceedings and claim damages caused by an antitrust infringement. Such right shall also apply to indirect purchasers. However, the Commission calls the attention to the fact that many victims, especially consumers and small businesses, are often deterred from bringing an individual action for damages because of the frequently low-value damage and the significant costs, delays and risks of such actions. The Commission therefore considers crucial to foresee a combination of two mechanisms of collective redress: (i) on the one hand, representative actions, which are brought by qualified entities, such as consumer associations, state bodies or trade associations; and (ii) on the other hand, opt-in collective actions, in which victims expressly decide to combine their individual claims for harm they suffered into one single action.

On the **access to evidence**, the White Paper acknowledges that competition cases are particularly fact-intensive and that much of the key evidence is often concealed and is usually not known in sufficient detail by the claimant. However it reminds that, whilst it is essential to overcome this structural information asymmetry, it is also important to avoid the risk of abuses in what regards disclosure obligations. Therefore, if, on the one hand, national courts should, under specific conditions, have the power to order parties to proceedings or third parties to disclose precise categories of relevant evidence, on the other hand, caution should be taken so that such requests are precise and the disclosure measures are relevant, necessary and proportionate.

The White Paper subsequently tackles the issue of the possible **binding effect of the national competition authorities' decisions**. The Commission considers that a more consistent application of Articles 81 and 82 should be ensured and legal certainty and procedural efficiency should be increased. Therefore, it suggests the adoption of a rule according to which national courts that have to rule in actions for damages on practices on which a National Competition Authority ("NCA") of a Member State has already given a final decision finding an infringement, or on which a review court has given a final judgment upholding the NCA decision or itself finding an infringement, cannot take decisions running counter to any such decision or ruling. It is stressed that this binding effect should be conferred only where all appeal avenues have been exhausted, and where the action relates to the same practices and same undertakings for which the NCA or the review court found an infringement.

1
See Case C-453/99 *Courage/Crehan*, ECR. 2001, p.I-6297, paragraph 26, and Joint Cases C-295/04 a C-298/04, *Manfredi*, ECR 2006, p. I-6619, paragraphs 60 and 61.

2
Green Paper - Damages actions for breach of the EC antitrust rules, in: http://europa.eu.int/comm/competition/antitrust/others/actions_for_damages/gp_en.pdf

3
White Paper on Damages Actions for Breach of the EC antitrust rules, in: http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/whitepaper_en.pdf

The White Paper also calls the attention to the diverse approaches taken by Member States concerning the **requirement of fault**. The Commission suggests that, in Member States requiring fault to be proven, once the victim has shown a breach of Article 81 or 82, the infringer is considered liable for damages caused unless he demonstrates that the infringement was the result of a genuinely excusable error. An error would be excusable if a reasonable person applying a high standard of care could not have been aware that the conduct restricted competition.

In what regards **damages**, the White Paper considers that victims must receive full compensation of the real value of the loss suffered, this covering the actual loss due to an anti-competitive price increase, the loss of profit as a result of any reduction in sales and the right to interest.

The Commission acknowledges that calculation of the *quantum* of damages may become excessively difficult or even impossible, since it implies a comparison with the economic situation of the victim in the hypothetical scenario of a competitive market. Thus, the Commission therefore proposes to draw up a framework with pragmatic, non-binding guidance for quantification of damages. It also suggests codifying the current *acquis communautaire* on the scope of damages that can be recovered.

In relation to the issues regarding the **passing-on of overcharges**, the Commission recalls that, in accordance with the compensatory principle, damages should be available to any injured person who can show a sufficient causal link between the injury and the infringement. Thus, infringers should be allowed to invoke the possibility that the overcharge might have been passed on (i.e., the fact that the direct customer of the infringer passed on the illegal overcharge to his own customers, the "indirect purchasers") as a defence against a claim for compensation of the overcharge. Nonetheless, indirect purchasers willing to be compensated should be able to rely on the rebuttable presumption that the illegal overcharge was passed on to them in its entirety.

The White Paper further considers that **limitation periods** can be a considerable obstacle to recovery of damages. In fact, in the event of a continuous or repeated infringement or in cases where infringements remain covert (as frequently happens with cartels) victims can face practical difficulties as regards the commencement of limitation periods.
The Commission therefore suggests that the limitation period should not start to run (i) in the case of a continuous or repeated infringement, before the day on which the infringement ceases, and (ii) before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him. Additionally, in order to avoid limitation periods expiring while an investigation by a NCA is ongoing, the Commission suggests that a new limitation period of at least two years is foreseen, which should start once the infringement decision has become final.

The **costs associated with antitrust damages actions**, and also the cost allocation rules, are also considered as potential disincentives to bringing an antitrust damages claim. The Commission therefore proposes that Member States consider, firstly, to design procedural rules fostering settlements, as a way to reduce costs; secondly, to set court fees in an appropriate manner so that they do not become a disproportionate disincentive to antitrust damages claims; thirdly, to give national courts the possibility of issuing cost orders derogating, in certain justified cases, from the normal cost rules.

Finally the White Paper addresses the issue of **interaction between leniency programmes and actions for damages**. Recalling the relevance of ensuring the attractiveness of leniency programmes, the White Paper considers that confidentiality of corporate statements submitted by a leniency applicant shall be adequately protected. Consequently, the Commission suggests that such protection is granted to all corporate statements submitted by applicants for leniency, regardless of whether the application for leniency is accepted, rejected or leads to no decision by the competition authority.

The Commission also considers that, in view if the importance of leniency programmes, the possibility of limiting the civil liability of the immunity recipient to claims by his direct and indirect contractual partners, thus excluding liability before the contractual partners of other companies participating in the cartel, shall be analysed.

Interested parties may submit comments on the White Paper, until 15 July 2008.

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