THE COMMENTS OF THE CHEMICAL INDUSTRY ON THE COMMISSION GREEN PAPER ON DAMAGES ACTIONS FOR BREACH OF EC ANTITRUST RULES
12 APRIL 2006

1- GENERAL COMMENTS

The Commission opened consultation on a Green Paper regarding the facilitation of actions for damages caused by violation of EC competition law. In its Staff Working Document, at point 12, it declares that one of the advantages of private enforcement would be to have a balanced approach as “The Commission wants to use the debate to find ways to better compensate for antitrust injuries and increase deterrence, while avoiding the situation where defendants settle simply because litigation costs are too high. The ultimate objective should be to foster competition culture, not a litigation culture”.

Cefic is convinced that an implementation of the concepts considered in the Green Paper would not enhance enforcement of EC competition law. Therefore, a persuasive justification of the proposed options is still outstanding.

Cefic is not convinced that the limited number of court actions brought in the EU is the result of deficiencies in the Member States’ legal systems.

The practice of imposing fines – e.g. by the European Commission (in total nearly 4 billion € since 2001), and the modernisation of application of EC competition law, including by national authorities and courts – impressively proves that the enforcement by public authorities is already today highly effective and deterrent. There is no reason to believe that changes to the liability for damages would appreciably change the level of deterrence:

- Prosecution of hardcore cartels is the focus for competition authorities.
- The system change makes available considerable capacity for uncovering less serious restraints on competition.
- The right of cartel authorities to conduct inquiries into particular sectors of the economy, irrespective of suspicion.
- The effective work of a network of national cartel authorities within which information can be exchanged much faster.
- Since the introduction of leniency programmes the number of successfully uncovered and prosecuted violations of competition law has increased sharply.
- Furthermore, undertakings have well taken notice of the criminal prosecution of hard core cartels in some Member States and certain foreign countries, and they are increasingly aware that, due to the effects doctrine and the potential for extradition among the EU Member States it is relevant to them.

As the former President of the German Monopoly Commission rightly stated, the problem is not the law but the facts1. In other words, it lies in the nature of claims for damages for violation of the antitrust laws that they are at best difficult to enforce.

If the concepts considered in the Green Paper became reality Cefic would expect non-hard-core violations to become the domain of private enforcement. Cefic understands that the Commission is willing to leave the risk of uncertainty about the facts with the alleged offenders (in practical terms, the employees and finally the end consumer).

**The implementation of many of the concepts considered in the Green Paper would lead to high social costs and to further negative impacts on the legal systems of the EU and of the Member States.**

Cefic believes the Commission’s endeavours for private enforcement run the risk of creating a system of over-enforcement at much higher social costs than any under-enforcement of the current regime.

Even where not associated with social costs, the disadvantages of an interference with the legal systems of the Member States should be taken into account:

- The unproductive costs of a significantly extended litigation, or even of the creation of a litigation industry should be avoided.
- Any approach ultimately taken by the Commission should fully respect the subsidiarity principle, i.e. leave the competence for private enforcement with the Member States where it cannot persuasively show that only the Commission can effectively protect the EC competition law. This is especially true in case of interference with national procedural rules, where harmonisation is particularly difficult.
- The unity and uniformity of the law is a high value in itself, because it is a precondition to a just law. Any approach taken by the Commission to implement the Green Paper would, due to restraints of the EU’s and the Commission’s competences, inevitably be fragmentary and, therefore, interfere with the uniformity of the affected legal systems.
- Having regard of the principle of unity of the law it even is to be questioned if there should be a special regime for infringement of competition law compared to other fields of law.

**In particular, the creation of a litigation industry is to be avoided. Cefic appeals to the Commission to make it better than in the United States.**

In the USA, it is clear that the interaction of several features ultimately has generated a tremendous and undesirable litigation industry. The US system is based on different cultural values and elements that over-encourage individual citizens to fight unduly before law courts, including with regard to anti-trust enforcement such as: treble damages, the exclusion of passing-on defence, the lack of right of recourse for defendants in antitrust related case, class actions, the discovery of documents, the rules of costs, jury trial and the attorney contingency fees (for more details, see our answer to Question O).

The U.S. tort system is the world’s most expensive. According to credible estimates, the U.S. economy is burdened by direct legal costs amounting, for example in 2003 to about US$ 250 billion or 2 percent of the U.S. gross domestic product, US$ 800 for every man, woman and child in the United States\(^2\). This trend seems to continue to grow rapidly by over 10 percent per year. This is a highly attractive market, particularly for specialized trial lawyers.

The social price to be paid for this excessive damages law is probably even higher than the costs to the economy and may also result in impediment to innovation. For example, excessive laws suits against manufacturers of drugs and medical devices have lead some chemical companies refraining from researching and entering into these markets.

Overall the US system has created a strong, and unfair, unbalance between the position of the plaintiff and of the defendant. Because of the special features of this system, a defendant is not in the position to fight and to have the dispute decided by a court on the merits. The only way out for a defendant is to settle, even in case it has sound legal arguments against the claim.

In the USA criticism is growing on competition lawsuits stemming from private actions. For example, Congress instituted an Antitrust Modernization Committee – inter alia to cope with excessive liability rules.

Therefore, the utmost care is required when introducing regulations whose core is an alien to continental European law traditions. Creating a special legislation on damages for cartels or other infringements of competition law at EU level would be extremely problematic and only cause a US-type litigation system, including its inherent unfairness, to be imported into the EU despite the denegation of the Commission.

The options represent a substantial departure from current litigation procedure in most Member States, which is NOT supported by the chemical industry. To undertake such a voyage is just neither right, nor supported by Cefic as identified in the responses given to the questions included in the Green Paper and detailed here below.

There are indeed fundamental principles upon which national litigation systems in some or all Member States are based and which should not be questioned:

- **No discovery** of evidence. Ultimately, a discovery system is incompatible with the majority of the Members States' legal system, and could in some cases conflict with the fundamental principle of non self incrimination.

- **No punitive, double or treble damages** but compensation for actual losses. Where legal interests may be claimed, this seems to serve a compensatory rather than punitive function.

- The **passing-on-defence** must remain admissible to prevent unjustified enrichment of plaintiffs who did not suffer damages.

- **No class actions.** The rule should continue to apply that each plaintiff should file its own case and prove that he/she suffered damages.

- **Loser pays the winner's legal costs.** To prevent unmeritorious claims, the losing plaintiff should pay the winning defendant's reasonable costs, and vice versa.

2- QUESTIONS RAISED IN THE GREEN PAPER

1.1. **ACCESS TO EVIDENCE**

**Question A : Should there be special rules on disclosure of documentary evidence in civil proceedings for damages under Articles 81 and 82 of the EC Treaty? If so, which form should such disclosure take?**

No. Special rules on disclosure of documentary evidence at EU level are rejected. Disclosure is a feature tailored for proceedings under common law and is inconsistent with the civil law proceedings of most Member States. Although civil proceedings in the EU Member States vary drastically, in Member States with a civil law system the general principle applies that plaintiffs must provide evidence for their claims.

Creating a special legislation on disclosure for damages under Articles 81 and 82 of the EC Treaty would constitute a far-reaching intervention into the procedural rules of the Member
States. Moreover, what justification could be given for limiting that disclosure exclusively to competition law? How could a judge deny in a personal injury case discovery while granting it in a competition case, when guaranteeing the principles of fair trial and equality? The national systems deserve more freedom to define their way for whatever objective the EU wants to introduce. Rules on disclosure of documentary evidence would be unduly prescriptive. The better tune might be to use the procedural tools already available in the Member States.

**Option 1:** Disclosure should be available once a party has set out in detail the relevant facts of the case and has presented reasonably available evidence in support of its allegations (fact pleading). Disclosure should be limited to relevant and reasonably identified individual documents and should be ordered by a court.

**Option 2:** Subject to fact pleading, mandatory disclosure of classes of documents between the parties, ordered by a court, should be possible.

**Option 3:** Subject to fact pleading, there should be an obligation on each party to provide the other parties to the litigation with a list of relevant documents in its possession, which are accessible to them.

**Option 4:** Introduction of sanctions for the destruction of evidence to allow the disclosure described in options 1 to 3.

**Option 5:** Obligation to preserve relevant evidence. Under this rule, before a civil action begins, a court could order that evidence which is relevant for that subsequent action be preserved. The party asking for such an order should, however, present reasonably available evidence to support a prima facie infringement case.

In addition, the proposed options 1-3 and 5 would lead to an extensive US-style-discovery with all the described negative effects (huge costs for the defendant, undesired disclosure of confidential information, even fishing expeditions etc.).

Discovery is a core element of the US law system and cannot be transplanted into most European law systems without massive frictions. Discovery would erode defence rights given in national legal systems, rendering them worthless. Any approximation of European provisions to the US discovery would enable US trial lawyers to extend their “business model” to Europe. This would considerably increase the risk for European companies of becoming victims of frivolous actions. The Commission knows there is this problem and permits e.g. that the application for leniency is possible in oral form.

This is not a defendant’s issue alone. The vast majority of the Member States have well considered not to adopt a discovery system. A discovery system even is incompatible with the fundamental principle of non-self incrimination. Any interference by the Commission with these essential decisions and the underlying fundamental rights would in itself massively hurt the Member States legal systems.

Therefore, options 1-5 are rejected.

**Question B: Are special rules regarding access to documents held by a competition authority helpful for antitrust damages claims? How could such access be organised?**

Access to documents held by competition authorities can certainly help to establish an antitrust damage claim. But, it needs to be assured that firstly the purpose of the leniency notice is not undermined and secondly that confidential business information / secrets are protected. Any cooperation under the leniency program and any document referring to this cooperation must therefore be excluded from such an access. The same is necessarily true for business secrets.

As a consequence, Cefic has serious doubts that it is feasible to implement a process that grants access to such documents and at the same time regards the above-mentioned concerns adequately.
Option 6: Obligation on any party to proceedings before a competition authority to turn over to a litigant in civil proceedings all documents which have been submitted to the authority, with the exception of leniency applications. Issues relating to disclosure of business secrets and other confidential information as well as rights of the defence would be addressed under the law of the forum (i.e. the law of the court having jurisdiction).

In view of the above this option has to be rejected.

Option 7: Access for national courts to documents held by the Commission. In this context, the Commission would welcome feedback on (a) how national courts consider they are able to guarantee the confidentiality of business secrets or other confidential information, and (b) on the situations in which national courts would ask the Commission for information that parties could also provide.

Option 7 is a question to be addressed by the Member States, not industry. Cefic has the following observation: should the Commission albeit decide to create special rules, the access would have to be limited to documents obtained by the Commission through compulsory measures, whereas any documents presented voluntarily within leniency applications are excluded. If the documents include business secrets or other confidential information, the national courts should be obliged to maintain confidentiality. Furthermore, national laws prescribe that both parties should have equal access to all documents, including confidential information. As a consequence, Cefic has serious doubts that it is feasible to implement a process that responds to all above mentioned concerns; the goal rightly described under (a) will not be achieved.

Regarding (b) the chemical industry draw the Commission’s attention to the fact that in civil law actions, it is the parties to the case who have to request access to specified documents. Without such a request courts have no right to act on their own authority.

Question C: Should the claimant’s burden of proving the antitrust infringement in damages actions be alleviated and, if so, how?

No, there should be no special rule concerning the burden of proof in the event of anti-trust infringements at EU level. The burden of proof is a core element of the respective national general procedures rules and the national systems would be rather disturbed by such rules at EU level. Besides, Article 2 of Council Regulation No 1/2003 states that "the burden of proving an infringement of Article 81(1) or of Article 82 of the Treaty shall rest on the party or the authority alleging the infringement."

Option 8: Infringement decisions by competition authorities of the EU Member States to be made binding on civil courts or, alternatively, reversal of the burden of proof where such an infringement decision exists.

Infringement decisions by competition authorities should not be binding to civil courts. To avoid that national courts contradict a Commission decision, it is already laid down in Article 16 of Council Regulation No 1/2003, that national courts "cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated."

A further going binding effect for decisions of all EU national competition authorities is rejected.

Firstly, there is no need for such rules, because already now claimants can rely on facts established by a competition authority. In practice, no case is known where a civil court expressly deviated from an infringement decision by competition authorities. Where is then the need for such a stipulation at European level?

Secondly, the problem for the claimant is usually not to prove that a breach of antitrust rules took place, but to furnish evidence for the damage suffered by the claimant due to that violation.
of competition law. Insofar the public authority decision is not the crucial point in most cases; since it normally does not contain anything on the question of causality or amount of damages. Moreover a binding effect would be very problematic for damages actions against companies which successfully applied for leniency, since these companies have no possibility to contest such decisions, as no negative decision was imposed on them. This would be an infringement of the guaranteed recourse to the courts.

Besides, the decisions by foreign competition authority can for jurisdictional reasons only have an effect for the respective country. Furthermore, the independence of judges and courts that is guaranteed in the constitutions of the Member States is one of the pillars of the rule of law which should not be touched.

It goes without saying that it should remain possible further on to introduce a decision by an authority as evidence, in the respective proceedings, within the general consideration of evidence, which, under the rules of the respective Member States even may imply an alleviation or even reversal of the burden of proof.

**Option 9:** Shifting or lowering the burden of proof in cases of information asymmetry between the claimant and defendant with the aim of redressing that asymmetry. Such rules could, to a certain extent, make up for the non-existent or weak disclosure rules available to the claimant.

This option relates to a general rule in national laws with which the EC law of competition should not interfere.

**Option 10:** Unjustified refusal by a party to turn over evidence could have an influence on the burden of proof, varying between a rebuttable presumption or an irrebuttable presumption of proof and the mere possibility for the court to take that refusal into account when assessing whether the relevant fact has been proven.

National courts have already today the possibility to take into account an unjustified refusal by a party to turn over evidence (option 10), for example, Article 10 of the French NCPC. Further alleviations of the burden of proof should be left to national legal systems.

As a consequence the chemical industry is against both options 9 & 10.

**2.2 FAULT REQUIREMENT**

**Question D:** Should there be a fault requirement for antitrust-related damages actions?

Yes, but this should be left to the national tort law. It certainly strikes as odd that in a national system that is based on fault requirement for tort action, there should be an exception introduced by the EU in an area where exposure and financial risk is especially high. This may lead to the question in national laws, how this can be brought in accord with the principle of equality.

In any case, antitrust related damages claims ought to be limited to fault as giving up the fault requirement would lead to a US-style litigation culture. In hard core cartels there will always be fault, anyway. But, in competition law there is a large grey area in which it is not easy to decide whether a behaviour was or is legitimate or not. The economic analysis to be included in the evaluation of an antitrust decision is not yet well established enough to enable predictable conclusions regarding their own conduct for the acting persons.

Abolition of the fault requirement would cause too many contradictory decisions between a competition authority and a court. Finally, there is the danger of useful entrepreneurial decisions not being made only because of the risk of damages claims. According to this, claims for damages ought also to be limited to hard core infringements of competition law.
Option 11: Proof of the infringement should be sufficient (analogous to strict liability).

Option 12: Proof of the infringement should be sufficient only in relation to the most serious antitrust law infringements.

Option 13: There should be a possibility for the defendant to show that he excusably erred in law or in fact. In those circumstances, the infringement would not lead to liability for damages (defence of excusable error).

In view of the above, options 11 to 13 are rejected by the chemical industry.

2.3 DAMAGES

Question E: How should damages be defined?

Cefic is of the opinion that the definition of damages should also be left to national law. It is substantially the same comment as under Question D, namely that introducing here an alien element to the national laws may have an impact on the general legal framework there under consideration of the principle of equality. Such detailed meddling of the EU would in consequence be too far reaching. Most national laws already provide for ex aequo & bono decisions by their judges, what might be a more suitable tool for this general problem.

Option 14: Definition of damages to be awarded with reference to the loss suffered by the claimant as a result of the infringing behaviour of the defendant (compensatory damages).

However, should the Commission decide to create special rules, option 14 seems to be more suitable as damages claims are only supposed to compensate a loss and are not there to "punish infringers". In addition, this option is more in line than the other options with most tort systems in Europe and the principle that the plaintiff should be put in the same position as he/she would have been in had the tort not been committed.

Cefic is obviously against the introduction in the EU of a US-style litigation system (eg treble damages is a key element of US litigation, the introduction of which is not supported).

Option 15: Definition of damages to be awarded with reference to the illegal gain made by the infringer (recovery of illegal gain).

Option 16: Double damages for horizontal cartels. Such awards could be automatic, conditional or at the discretion of the court.

In any case, Cefic strongly rejects the adoption of double damages – as proposed in option 16 – because this would mean US-style punitive damages, which are absolutely incompatible with the legal systems in continental Europe. Tort law serves exclusively to compensate for damage, followed by the goal of creating a situation more or less equal to what would have been had the damaging event not occurred. By contrast, further going aims – as they are pursued by double damages intended to penalize and deter – fall under the state monopoly of criminal law. Consequently such aims cannot be pursued in civil proceedings.

There is no justification for granting to victims of antitrust violations windfall profit beyond the compensation of actual damages.

In Europe, US suits or court decisions aiming at treble damages have often be held to be either undeliverable or unenforceable, because they were found to be incompatible with the national ordre public. In so far, the public order reservation is included in Article 13 (in connection with Article 23) of the Hague Convention on the Taking Evidence Abroad in Civil or Commercial Matters applies. This reservation has repeatedly helped the European industry to resist actions frivolously shipped to a US forum. Ultimately, this legal tool has the potential of limiting the exposure of European companies to actions in the US to the value of their US assets; it therefore mitigates blackmailing exercises undertaken by plaintiffs' lawyers.
The introduction of double damages for competition cases would re-shape the ordre public of the Member States. It could hardly be argued any longer that treble damages claims contravene the Member State’s ordre public. Probably the decisive hurdle for the enforcement of US treble damages claims in Europe would be removed. The facilitation of legal proceedings to be shopped before a US forum would thus severely harm the European economy.

The problem is that in many competition law cases the damage is atomised.

The Commission itself states that “the exact distribution of damages along the supply chain could be exceedingly difficult to prove.” For instance, if a restaurant owner buys new marble tiles for his/her restaurant at a price that is too high because of a cartel. At first sight he/she has a financial loss but at closer inspection one has to take into account that he/she will hand the higher price down to his/her guests. The guests on their part could pass the higher prices e.g. for a business lunch down to their companies and so forth. In the end there is nobody who has a real and enumerable damage to be claimed. Cefic So the question is “who should keep the cartel bonus”? Cefic is of the opinion that this should not be someone in the sales chain (who would often be overcompensated by this bonus) but the general public through the enforcement by public authorities.

That is why in most Member States the recovery of illegal gain is left exclusively to the competent authorities. Besides, any recovery by private parties, as proposed in option 15, is faced with the problem of how to divide up the profits by the claimants.

Therefore, options 15 and 16 are rejected.

**Option 17:** Prejudgment interest from the date of the infringement or date of the injury.

Once again, this should also be left to the national law.

**Question F : Which method should be used for calculating the quantum of damages?**

The method for calculation the quantum of damages, too, should be left to national law. Introducing here an alien element to the national law may have an impact on the general legal framework there under consideration of the principle of equality. Such detailed meddling of the EU would also in consequence be too far reaching.

**Option 18:** What is the added value for damages actions of use of complex economic models for the quantification of damages over simpler methods? Should the court have the power to assess quantum on the basis of an equitable approach?

**Option 19:** Should the Commission publish guidelines on the quantification of damages?

**Option 20:** Introduction of split proceedings – between the liability of the infringer and the quantum of damages to be awarded – to simplify litigation.

None of options 18 to 20 adequately reflects the problem: in civil proceedings – and not only under antitrust law – quantifying damage can be highly “complex” without giving a value judgment of reproach. Establishing the facts relevant to antitrust aspects means clarifying real and presumed courses of events. Therefore, it is appropriate for the parties to resort to business administration expertise. After all, this is also conducive to just and correct decision-making by law courts/public authorities. If efforts to establish the facts in an individual case do not bring any progress, the possibility to estimate damage is open to courts, anyway – but only at this stage.

Guidelines for public authorities for the quantification of damage, as proposed in option 19, will not bring any improvement here; neither will split proceedings – between the liability of the infringer and the quantum of damages to be awarded, as proposed in option 20 – because split proceedings do not solve the addressed problems in damage quantification.
Therefore, options 18-20 are rejected by the chemical industry.

2.4 THE PASSING-ON DEFENCE AND INDIRECT PURCHASER’S STANDING

Question G: Should there be rules on the admissibility and operation of the passing on defence? If so, which form should such rules take? Should the indirect purchaser have standing?

No, again, the chemical industry believes that such rules should be left to national law, because, the definition of damage is a core element of the national tort law system. Therefore, there is no need for a special rule on EU level. Otherwise, the purpose of tort law, i.e. to compensate for damage, would be eroded – favouring a criminal function of civil law alien to the European legal concept. The aim not to let parties to cartels enjoy the advantages gained through cartel violations can be ensured otherwise. Possibilities are administrative fines and the skimming off of illegal gains. Furthermore, there are damage claims of those who really suffered.

Option 21: The passing-on defence is allowed and both direct and indirect purchasers can sue the infringer. This option would entail the risk that the direct purchaser will be unsuccessful in claiming damages as the infringer will be able to use the passing-on defence and that indirect purchasers will not be successful either because they will be unable to show if and to what extent the damages are passed on along the supply chain. Special consideration should be given in this respect to the burden of proof.

However, within national law the adjustment of damages by benefits received ("passing-on defence") must remain possible, as described in option 21, because this prevents unreasonable outcomes, e.g. in a case where the damage (high price because of a cartel) was shifted to the next commercial level (high resale price) and no decrease of sales arose. Without the passing-on defence, plaintiffs – who passed on the damage to their customers – would find themselves in a better position than without the cartel violation, possible even at the cost and with the exclusion of those actually suffering the damage.

If indirect purchasers cannot prove damages this indicates only that they did not really suffer damages. If those indirect purchasers nevertheless should have a right to bring damages actions the risk occurs that damages are granted to someone who has not suffered anything as well as the risk that the defendant may have to pay the same damage several times. Here is the risk of overcompensation.

Option 22: The passing-on defence is excluded and only direct purchasers can sue the infringer. Under this option direct purchasers will be in a better position as the difficulties associated with the passing-on defence will not burden the proceedings.

Option 23: The passing-on defence is excluded and both direct and indirect purchasers can sue the infringer. While the exclusion of the passing-on defence renders these actions less burdensome for the claimants, this option entails the possibility of the defendant being ordered to pay multiple damages as both the indirect and direct purchasers can claim.

Option 24: A two-step procedure, in which the passing-on defence is excluded, the infringer can be sued by any victim and, in a second step, the overcharge is distributed between all the parties who have suffered a loss. This option is technically difficult but has the advantage of providing fair compensation for all victims.

Excluding the passing-on defence as a matter of principle, as proposed in options 22-24, would give damages claims a criminal function totally alien to the European civil law system. Again, civil law serves to compensate damages really suffered. It is no substitute for public authority sanctions. In addition, the fact that a claimant who has suffered no damage should nonetheless be rewarded a claim is simply an injustice.

Therefore, Cefic is not in favour of options 22 to 24. Option 21 should be safeguarded within the respective national legal systems.
2.5 DEFENDING CONSUMER INTERESTS

Question H: Should special procedures be available for bringing collective actions and protecting consumer interests? If so, how could such procedures be framed?

No, the chemical industry is strongly against special procedure rules at EU level regarding collective actions as proposed in options 25 and 26. Collective actions would certainly open the door to a US-style litigation culture. The “better regulation” approach of the EU Commission is made meaningless with such an idea, as it contains no gain for competition, but a serious risk of misuse.

Option 25: A cause of action for consumer associations without depriving individual consumers of bringing an action. Consideration should be given to issues such as standing (a possible registration or authorisation system), the distribution of damages (whether damages go to the association itself or to its members), and the quantification of damages (damages awarded to the association could be calculated on the basis of the illegal gain of the defendant, whereas damages awarded to the members are calculated on the basis of the individual damage suffered).

Widening for consumer organisations the right to bring actions, as proposed in option 25, seems a wrong step.

In terms of competition there is no practical need for this approach but a serious risk of misuse: consumer organisations cannot bring forward that they themselves suffered damage or injury, and they would act as self-appointed agents of consumers who allegedly did. If the individual consumer retains his/her right to bring an action, the question arises of the relation between the two claims. After a successful case by an organisation, do individual consumers turn to the organisation to receive damages, or is the right to damages of the organisation subsequently reduced? Besides those questions, it must be feared that, at a time of short public funds, consumer organisations are to be provided with a new financing instrument in the form of damage claims.

The danger of misuse is evidently considerable.

Option 26: A special provision for collective action by groups of purchasers other than final consumers.

The introduction of special provisions for collective action by groups of purchasers would certainly lead to US-style class actions which are certainly not intended to be introduced in Europe after the negative experiences in the USA. Class actions are from a European law perspective exceptional. Despite the tendencies in Sweden, UK and France to consider opening their systems to class actions, most European jurisdictions do not. Even in its homeland, the USA, the use of class actions is not beyond doubt, and has just been reformed in the Class Action Fairness Act of 2005.

One of the core elements of a class action is the automatic extension of the legal effect to third parties, not involved in the case.

This principle stands in contradiction to the tenets of European constitutional and procedural law which intends to provide legal protection for the individual. In view of the risks of misuse, the existing European system must not be displaced or eroded by excessive forms of collective actions, and this demand applies also to competition law. The decision whether a potentially damaged party wishes to bring action must remain his/her individual choice, e.g. this decision should not be made by plaintiff lawyers hungry for litigation.

Furthermore, such collective actions are not necessary in Europe where competent authorities can take effective measures against breaches of antitrust rules. After all, already now courts
throughout Europe have the option to bundle together cases with connected facts and to channel them toward procedurally efficient dispute settlement.

In Europe, US class actions or court decisions based on class actions may be undeliverable or unenforceable, since they may not be in line with the respective Member State’s ordre public (see the “public order reservation” in Article 13 (in connection with Article 23) of the Hague Convention on the Taking Evidence Abroad in Civil or Commercial Matters). An introduction of class actions in competition law could not be disregarded when assessing the national ordre public. The risk of a frivolous forum shopping to the US would rise significantly, and even the exposure to proceedings rightly brought before US court would be increased due to a higher blackmailing potential. Here again the result would be a severe harm the European economy.

Therefore, options 25 and 26 are rejected by Cefic.

**2.6 COSTS OF ACTIONS**

*Question I: Should special rules be introduced to reduce the cost risk for the claimant? If so, what kind of rules?*

No, once again, Cefic is of the opinion that this should be left to the national law.

*Option 27:* Establish a rule that unsuccessful claimants will have to pay costs only if they acted in a manifestly unreasonable manner by bringing the case. Consideration could also be given to giving the court the discretionary power to order at the beginning of a trial that the claimant not be exposed to any cost recovery even if the action were to be unsuccessful.

Any reduction of the general cost risk for claimants would constitute deep interventions in national legal systems, encouraging the development of a “litigation industry” in Europe. The principle of the "loser pays" that is included in various Member States system should be maintained because it is, among others, a core element which prevents our legal system from turning into a US-style "litigation culture".

Therefore, Cefic rejects option 27.

**2.7 COORDINATION OF PUBLIC AND PRIVATE ENFORCEMENT**

*Question J: How can optimum coordination of private and public enforcement be achieved?*

Public enforcement is the duty of the state, private enforcement is the right of the citizen. Private enforcement of competition law is bond to interfere with public enforcement of competition law and therefore the starting question should be if and (when the answer is yes) to what extent a coordination between these two is required and possible at all.

*Option 28:* Exclusion of discoverability of the leniency application, thus protecting the confidentiality of submissions made to the competition authority as part of leniency applications.

*Option 29:* Conditional rebate on any damages claim against the leniency applicant; the claims against other infringers – who are jointly and severally liable for the entire damage – remain unchanged

*Option 30:* Removal of joint liability from the leniency applicant, thus limiting the applicant’s exposure to damages. One possible solution would be to limit the liability of the leniency applicant to the share of the damages corresponding to the applicant’s share in the cartelised market.

Private damages actions will put into question particularly the incentive of leniency programmes.

The more severe the instruments of private enforcement are made, the greater the negative effects on leniency programmes. These programmes provide no protection against demands for damages which are raised against companies that submit an application to be treated under a leniency programme. Experience shows that the first party that confesses to a competition
authority is sued for compensation, and is then liable for all damages claimed as the overall debtor. The leniency programmes are a successful strategy for the detection of cartels whose effectiveness is at risk, if, in addition to compensation, a further penalising overcompensation is threatening by private enforcement.

Since Cefic believes the introduction of discovery is wrong (see question A), option 28 would consequently not be required. Otherwise, the consideration behind option 28 does, however, make sense. It should, however, not be lost out of sight that option could, if a discovery system were implemented, hardly effectively protect the whistleblower since e. g. the evidence presented by him would require protection as well regardless of whether it has also been collected from other defendants.

Therefore, a discovery system can hardly be made compatible with a protection of leniency applications at all, and thus, option 28 is no a suitable remedy.

For options 29-30 Cefic does not see the need for mixing up here private and public enforcement. Both options depart from the principle of compensation for actually suffered losses; they arbitrarily determine the awarded amount of damages. Reference is also made to the comments to Question H.

Therefore, if discovery was to be introduced, option 28 is supported. In any case, options 29-30 are rejected.

2.8 JURISDICTION AND APPLICABLE LAW

Question K: Which substantive law should be applicable to antitrust damages claims?

Option 31: The applicable law should be determined by the general rule in Article 5 of the proposed Rome II Regulation, that is to say with reference to the place where the damage occurs.

Option 32: There should be a specific rule for damages claims based on an infringement of antitrust law. This rule should clarify that for this type of claims, the general rule of Article 5 shall mean that the laws of the states on whose market the victim is affected by the anticompetitive practice could govern the claim.

Option 33: The specific rule could be that the applicable law is always the law of the forum.

Option 34: In cases in which the territory of more than one state is affected by the anticompetitive behaviour on which the claim is based and where the court has jurisdiction to rule on the entirety of the loss suffered by the claimant, it could be considered whether the claimant should be given the choice to determine the law applicable to the dispute. This choice could be limited to choose one single applicable law from those laws designated by the application of the principle of affected market. The choice could also be widened so as to allow for the choice of one single law, or of the law applicable to each loss separately or of the law of the forum.

Most antitrust damages claims relate to contractual relationships. Where a domestic contractual relationship (within one Member State) is affected the applicable substantive law is obvious. Contracts between parties in different Member States are subject to the contract statute which almost always is determined by a choice of law clause in the contract and also applies to related claims for damages (even where they are based on tort).

Usually the contractual choice of law will be valid regardless of whether the EC competition law has been infringed.

Vertical agreements may partly be void due to the infringement. The law applicable on the contract (e. g. a national law) will decide on whether the other provisions of the contract will be upheld or whether the contract as a whole is voided.
Horizontal agreements are to be seen separately from supply agreements which have harmed customers paying too high prices. Whether the nullity of the horizontal concerted practice is extended to the agreement is decided by the law applicable on the contract. Due to the choice by the parties and the fact that contracts are used to be drafted in regard of and consistent with the chosen law, the agreed choice of law usually is the most appropriate and should be respected. Where the parties have validly chosen a substantive law, it should prevail.

The presumably not many cases not governed by a contractual choice of law certainly do not justify the implementation of a specific rule for damages claims based on an infringement of antitrust law. The applicable law should rather be determined by general conflict rules (lex loci delicti commissi). Consequently, option 31 is preferable.

The chemical industry does not anticipate option 32 to make a practical difference compared to option 31 and see no need for it. Options 33 and 34 even are harmful, not useful.

Option 33 would permit forum shopping, even to a forum which is not well-placed or whose rules are not in line with the European or a Member State’s order public. It would promote lawsuits to be filed before US courts and the associated excesses. Option 34 solves a problem which is not there: if a claimant is affected in several Member States there will likely be a contract statute (often one single). Otherwise it would only ensure that the plaintiff could optimise the choice of law in line with his economic interests, not however, the appropriateness of the choice of law.

Since Option 34 is based on the condition that the court has jurisdiction to rule on the entirety of the loss suffered by the claimant a law could be chosen which is not the courts home law, i. e. the court is not familiar with; this simply makes no sense.

Therefore, option 31 is supported, whereas, options 32-34 are rejected.

2.9 OTHER ISSUES

Question L: Should an expert, whenever needed, be appointed by the court?

Option 35: Require the parties to agree on an expert to be appointed by the court rather than by themselves.

Under many national procedural laws the parties can present expert evidence, and the court can mandate an own expert if the court itself is unable to evaluate the positions presented by the parties to quantify the damage. Generally speaking, in such cases each party will have to retain its own expert: the plaintiff to credibly quantify his/her claim; the defendant to rate where his/her litigation risk lies and to find out if a settlement at an early stage of the lawsuit makes sense. What would be the benefit of an EU regulation on this point? Cefic sees rather the risk that it may not well fit into national systems.

Question M: Should limitation periods be suspended? If so, from when onwards?

Option 36: Suspension of the limitation period for damages claims from the date proceedings are instituted by the Commission or any of the national competition authorities. Alternatively, the limitation period could start running after a court of last instance has decided on the issue of infringement.

No, limitation periods are, again, core elements of national legislations and should not be affected.

Option 36 extends limitation periods under civil law in a manner incompatible with legal certainty and economy in legal proceeding. Also in antitrust follow on claims, as usual in claims arising from illicit acts, points of reference must be the knowledge or the reasonable possibility to obtain knowledge of the party entitled to bring action.
In the EU Commission’s view, private enforcement is to become a form of antitrust enforcement of its own - less dependent on public authority procedures than in the present situation. In the limitation issue it is, therefore, inconsistent to again link civil law claims with public authority procedures. Even apart there from, no justification for an extension of the limitation period by another e. g. 5 years is to be seen. Besides, limitation depending on the completion of public authority procedures in any Member State would indefinitely postpone its becoming effective, also resulting in impracticable requirements for potential defendants regarding the preservation of evidence (including the presentation of plaintiffs’ documents that might benefit defendants in the quantification of damage).

**Question N : Is clarification of the legal requirement of causation necessary to facilitate damages actions?**

As for many other questions raised in this Green Paper, Cefic is of the opinion that this should also be left to the national law. Therefore, the principles on causation between offence and damage, as developed in the national legal systems, should be maintained. Any further discussion for purposes of antitrust follow-on claims seems superfluous.

**Question O : Are there any further issues on which stakeholders might wish to comment?**

Cefic would like to comment in general terms on the adverse effect the introduction of a US-style litigation system may have, as it is crucial in view of the content of the Green Paper.

U.S. law in general is based on different cultural values and is aimed much more at pushing through one’s own claims in civil court proceedings (so-called private law enforcement). For instance, the Department of Justice, unlike the European Commission, does not have the authority to impose fines for breach of antitrust rules. The U.S. authorities can only take legal action just like private parties. This explains the major role that civil damage suits play in antitrust law.

Consequently U.S. law gives private parties an eminent position in the enforcement of laws. For that purpose U.S. antitrust-law and the general procedural law employ certain elements encouraging individual citizens to fight for their rights before law courts, such as :

- **Treble damages**
- **Passing-on defence** which in principle is excluded,
- **No right of recourse within defendants**: the parties participating in an antitrust violation are jointly and severally liable but a settlement between a plaintiff and one of the parties to the cartel has no effect on the other alleged cartel violators. In practice this "removal" from the case of one or several parties to the cartel exponentially increases the amount of damages to be probably paid by the remaining parties.
- **Class Actions**: the economic incentive for private damages actions is significantly increased by the option to file class actions. With a class action the sole named plaintiff sues not just on his or her own behalf, but on behalf of all those similarly affected. On the surface, the basic idea behind these suits is logical. From an economic point of view, it makes little sense to continually address the same question in many different trials, especially as there is a risk that the results will vary, and people who have suffered comparatively minor damage might be deterred from pursuing their claims at all.

But in practice, a class action puts massive pressure on the defendant just because of the sheer size of a potential award of aggregated claims. In many cases this pressure will cause him to settle cases rather than risk everything on a single lawsuit – even if there are meritorious arguments for the defence. For that reason only about 5 percent of class action
suits are actually fought out in court – but when they are, the decisions are quite often spectacular.

Meanwhile risks of misuse, as they come with the growing number of class action cases, are scrutinized in a critical light also in the USA. To remedy shortcomings the US government recently adopted a reform of class action legislation (Class Action Fairness Act of 2005).

- **Discovery of documents**: While in civil procedures practice according to the continental European concept the principle applies that plaintiffs must provide evidence for their claims, U.S. law takes a different approach. In the USA a far-reaching "pre-trial discovery" gives plaintiffs, already at a very early stage of the proceedings, the right to demand that the defendant or any third party present all documents that might be relevant to the case in any way. The basic concept of discovery makes sense only at first glance. The idea is that both parties and the court itself should be fully informed of the facts of each case. This encourages either the conclusion of a reasonable settlement or – if a reasonable settlement cannot be worked out – a fair judgement. But what this so often leads to in practice is that any documents that could be even remotely connected with the subject-matter of the case have to be presented to the other side. In major lawsuits, companies are often forced to present hundreds of thousands, if not millions, of documents to the other side. Dozens of lawyers will regularly spend months at a time evaluating these documents in the search for compromising, incriminatory or contradictory information.

Whether wrongly or rightly, this invariably means an immense burden for the party concerned as well as high costs that might easily add up to several millions of U.S. dollars. There is also the danger of downright "fishing expeditions". Moreover it can be problematic to comprehensively protect confidential business information, because the provided documents can become part of the proceedings and thus also accessible to the media. In the end the US-discovery means boiling a whole ocean just to make a cup of tea.

It should further not be overlooked that the discovery system is one of the main incentives for defendants to end a lawsuits by a settlements, even regardless of its merits. Symptomatic is the concept of US legal practice to settle "at nuisance value".

- **American rule of costs**: The defeated party is under no obligation to reimburse costs according to U.S. law, with only very few exceptions. This means that even the winning party is left to pay its own costs, which in major lawsuits can quickly add up to tens or even hundreds of millions of dollars. Here, too, the basic idea seems to make sense at first: no one should have to be deprived of his or her "day in court" because of the cost risk. On the other hand, it is easy to see why defendants become willing to reach a settlement when they can see that their own legal costs will soon exceed the settlement figure being sought by the plaintiffs. Lawyers representing the plaintiffs frequently seek a settlement, too, because a settlement at an early stage keeps their expenditure low.

- **Attorney contingency fees**: In the USA cartel damages claims are often investments by law firms. In this "business model" specialised trial lawyers at first search for relevant competition matters and subsequently identify suitable plaintiffs. The latter can file actions practically without any cost and risk, because lawyer's fees become due only if the case is successful. This has the effect that plaintiff lawyers are awarded high fees (30 to 40 percent of the damages are not unusual) and the broad class of plaintiffs only receives coupons of a limited value.

- **Jury trial**: in the eyes of the members of the jury, large companies are almost always by definition the wrongdoers, regardless of whether a company has been convicted before. Instead, competition law matters should only be judged by accordingly educated competent judges
The highlighted special features of U.S. law put strong pressure on defendants to end cartel cases as early as possible. In fact, in the USA – unlike in European practice – cartel cases are almost never concluded by a court decision but practically always by a settlement. This holds true also for cases where a conviction is unlikely. Quite obviously, such arrangements are not necessarily conducive to competition.

In the USA criticism is growing of competition lawsuits stemming from private actions. For example, Congress instituted an Antitrust Modernization Committee – inter alia to look into somewhat less stringent liability rules. Donald Baker, a former US Assistant Attorney General for Antitrust, only recently warned other countries against introducing similar systems based on private actions (see Donald I. Baker, *Revisiting History – What have we learned about private antitrust enforcement that we would recommend to others?* Loyola Consumer Law Review, Vol. 16:4, February 2004).

What remains is that US-antitrust law enables misuse to a large extent and may lead to absurd results. Therefore, we welcome the fact that the Commission seems to be aware that fostering private damage actions increases the risk of unmeritorious claims being brought and thereby might will certainly lead to a U.S.-style litigation culture.

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