Dear Sirs

Green Paper on Damages Actions for breach of the EC antitrust rules

This response to the Green Paper is made on behalf of Ernst & Young LLP, the UK firm of the global Ernst & Young network. The main basis for our comments is our experience in assessing damages for losses suffered due to anti-competitive behaviour, before the UK High Court. We have also assisted clients in the financial issues raised by a number of anti-trust enquiries by the UK Office of Fair Trading, the UK Competition Commission and the European Commission.

We emphasise that, as we are not a law firm, we are not expressing views on many of the legal issues raised by the Green Paper but we believe that our financial and accounting expertise and experience provides a sound basis for our comments on the financial issues raised.

General view

We welcome the publication of the Green Paper, which we believe to be a positive step in the discussion of damages in anti-trust cases. We recognise that the Commission is seeking to encourage private actions to enforce anti-trust regulations, and that these actions are intended to go beyond the “follow-on” actions that represent most of the cases that have so far occurred. This is a public policy matter on which we do not comment.

In our view, the main barriers to private actions are likely to be related to the availability of information and evidence. Whereas regulatory bodies have extensive powers to search for documents, private litigants will inevitably be reliant (at least initially) on very restricted information to form a basis for action.

We do not believe that the lack of formal guidelines for the assessment of damages is likely to cause a problem for potential claimants. In our experience (in both anti-trust and other matters), it is best to examine each situation on a case by case basis, and arrive at the most appropriate method or combination of methods that would bring about the fairest result in the circumstances. Lawyers and expert accountants have had considerable experience of working out how to deal with novel situations in the past and, over time, we believe that a body of precedent will develop to assist claimants in their consideration of potential actions.

We believe that there is a danger in attempting to provide guidelines on the calculation of damages, as they are likely to become restrictive, and prevent parties from challenging what might become weak arguments in specific cases. In our view, the reality of most cases is that a combination of
approaches, supported by a variety of information, is likely to lead to the most appropriate
assessment of loss and provide a tribunal with the material it needs to form the basis for a decision.

Comments on particular questions

Questions A to C: Disclosure of documentary evidence

Adequate disclosure of relevant documentation is an important issue in the calculation of damages.
Our general experience is that greater disclosure of information – providing as complete and
accurate a picture of the circumstances as possible – leads to a more robust estimate of any damages
suffered.

We would suggest that documents relevant to the quantification of damages should be disclosed,
whether they are in the possession of a regulator or of the parties. We recognise the confidentiality
issues this will raise, especially as claimants will often be direct competitors or customers of the
potential defendant. In our experience, it is possible to deal with confidentiality concerns by
creating a “confidentiality ring” comprising named individuals (who may be a combination of legal
advisers and expert witnesses) who are independent of the operations of the parties concerned. The
members of such a ring would need to operate under strict rules preventing disclosure to the parties,
possibly with the addition of court sanctions to ensure their compliance.

Prima facie, it is attractive to implement a requirement that an unreasonable refusal by one party to
provide relevant documentation, specified by the relevant tribunal, should result in a shift of the
burden of proof. We would suggest caution before implementing such a requirement, because the
issue of what constitutes “unreasonableness” is not entirely clear, so further disputes might be
created.

Questions E and F: Quantification of damages

We recognise the decision that has to be made between damages based on compensatory principles
and damages based on recovery of illegal gains. In our view, it is more appropriate to follow the
compensatory principle – we do not believe it is reasonable that a claimant should have the
opportunity to over-recover as there is no good reason for anti-trust cases to be dealt with differently
from other actions.

In our view there is a mechanism for ensuring the recovery of illegal gains: we suggest that fines
should be based on the broad principle of seeking to recover such gains (hence for the credit of the
public purse) leaving private claimants to recover their own losses. The eventual outcome could be
that defendants suffer double damages: once by way of fine and once by way of damages. We do
not believe that claimants should obtain double recovery.

The calculation methods listed in the staff working paper are useful guidelines but we do not believe
it is possible, or indeed desirable, to try to impose a limited series of methods on anti-trust cases.
Our experience has been that, in practice, cases are best approached on their own merits, using the
information that is available to determine the appropriate methodology to follow. In most cases, we
believe that parties (and their experts) will seek to use several methods, combining the results in a
suitable way to achieve a robust result which stands up to challenge from the other party and can
then be relied upon by a tribunal. We believe that there is a danger that imposing a set of
methodologies to calculate damages will result in too much emphasis being placed on the form of
calculation rather than the substance of the specific claim for damages. We also do not see a need to
treat anti-trust damages cases differently from other categories of damages cases, by providing
quantification guidelines specifically for use in just that one category of case.
We understand that it has been suggested that a default minimum level of damages for cartel behaviour should be introduced, perhaps by way of an assumption that a cartel increases prices by at least 10%. We see the attraction in this, in that it would enable any claimant to achieve a recovery without the need to produce evidence of loss (which we are aware could be complex and difficult). However, in our view, the benefits are insufficient to overcome the disadvantages in such an approach:

- It might, perversely, create an incentive for cartels. A potential cartelist might make a conscious decision that the risk of entering a cartel is likely to be limited to the recovery of a 10% price increase, even where the cartel produces considerably greater gains.
- It might unwittingly create an assumption by tribunals that 10% is the order of magnitude of the likely price benefit to be gained by a cartel when, in reality, the gains might be much greater.
- It treats anti-trust cases as fundamentally different from other cases (where there is no assumed minimum level of loss) which we do not believe is appropriate or desirable.

**Question G: Passing-on defence**

In our view, the logic of the compensatory principle of calculating damages requires that the passing-on defence in cartel cases should be allowed, to prevent the claimant who has suffered little or no loss from being unjustly enriched.

We recognise that this gives rise to a policy concern – the risk that a claim can only realistically be pursued by a direct purchaser who has suffered little loss, and that the end purchasers who have really suffered the loss will not be inclined to seek compensation due to their concerns over the likely cost relative to their individual damages. This is inevitable in most cartel cases, where the cartel supplies a limited number of direct purchases, who in turn supply a larger number, and so on until the product reaches the public.

In our view, the most logical approach would be to expand on the solution suggested in option 24 of the Green Paper: prohibit the passing-on defence, allow the immediate purchaser to sue, but only let it retain that part of the damages it actually suffered. The rest of the damages could then be retained in a fund to be divided among those end purchasers who can show they have suffered a loss. Such a process would require many details to be worked through, such as the extent of evidence required by “end purchaser” claimants, the need for a strict time limit for such claims to be made, the costs of managing the process of dealing with end purchaser claims, a possible need for some kind of oversight or trusteeship, and a default use for any remaining funds.

We agree that the weakness of permitting the passing-on defence is that it reduces substantially the incentive for a private claimant to launch an action. We believe that one way of encouraging immediate purchasers to sue, despite their inability to keep most of the damages, would be to implement new rules for dealing with the liability for costs in such an action. Our suggestions for such rules, which could be implemented singly or possibly in combination, are as follows:

- impose a minimum share of damages for the claimant, irrespective of its actual loss;
- require each claimant to suffer a reduction in its claim to cover the costs of the original action taken by the immediate purchaser;
- allow the immediate purchaser that leads the action to recover all of its costs out of the damages fund, so that the claimant itself will not be liable for any costs of a successful action;
allow the immediate purchaser that leads the action to charge a “management fee” (set by the tribunal) to the damages fund as compensation for its time and trouble in bringing the action on behalf of itself plus indirect purchasers.

**Question H: Collective actions**

We agree that, having taken the policy decision to encourage private actions in general, the Commission should seek to encourage collective actions by consumer associations on behalf of groups of individual consumers. We suggest that the lead claimant approach used for individual actions (as above) could similarly apply to such actions.

**Question I: Reduction in cost risk for the claimant**

We do not believe it is necessary to rule that unsuccessful claimants will have to pay costs only if they acted in a manifestly unreasonable manner by bringing the case, for two reasons. First, it requires a behavioural judgement to be made, which we believe is a recipe for further argument; secondly, we do not see that anti-trust actions should be dealt with in a different way from other actions. We suggest that it is preferable to follow existing national rules on costs awards.

**Question J: Co-ordination of private and public enforcement**

We do not believe that a successful leniency applicant should have its obligation for disclosure or liability for damages restricted. Such an applicant has already benefited from its action through reduced fines from the regulator, and it should remain liable for the damage it has caused to third parties. In our view this ensures that the regime is consistent in regarding the penalty issue as one for the public authorities, and the damages issue as one for private claimants.

We would point out that excluding a leniency applicant from liability to damages is likely to result in other cartel members bearing a disproportionate share of the burden of damages for the losses the cartel’s victims have suffered. This would be particularly unreasonable if the party granted leniency was the one most responsible for the existence of the cartel in the first place. Moreover, if several cartel members apply for leniency (and application for leniency is different from the granting of leniency) it is possible that there will few, if any, left to meet damages claims from victims of the cartel.

**Question L: Appointment of expert by the court**

Our experience of single experts does not give us confidence in that approach for substantial matters, and we believe that the question of whether the parties or the tribunal should appoint experts should be a matter for national laws. It might be that tribunals should be encouraged to appoint their own experts where damages issues are highly uncertain but we believe that is similarly a matter for local practice.
Conclusion
We are grateful for the opportunity to respond to the Green Paper, and hope that you find these comments helpful for your consideration of these issues. If you would like to discuss any of the matters raised, please feel free to contact the undersigned.

Yours faithfully

[Signature]

Philip Haberman
Partner
Ernst & Young LLP
United Kingdom